Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBIN JOHAL, PETITIONER

v.

LITTLE LADY FOODS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In a discrimination case based upon *McDonnell Douglas v. Green*, can the evidence, presented in support of a motion for summary judgment, of an employer's legitimate nondiscriminatory reason for the discharge of an employee be so compelling as to preclude consideration and review of evidence submitted by the discharged employee to prove pretext?

II. Should the "legitimate expectations" test or the "objective qualifications" test be the standard to establish the "qualification" element of a *prima facie* case pursuant *McDonnell Douglas v. Green* in a case of alleged unlawful and discriminatory discharge?

III. Can an employee use evidence of the workforce composition of upper management as an element of circumstantial evidence of discriminatory intent without presenting evidence of the qualifications of the members of management?

IV. Does a genuine issue of material fact exist which precludes the grant of summary judgment?

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The opinion of the Court of Appeals is reported as *Johal v. Little Lady Foods, Inc.*, 434 F. 3d 943 (7th Cir. , 2006). It is reproduced in the Appendix at App. 1a. The opinion of the District Court granting respondent's motion for summary judgment is unreported and is reproduced in the Appendix at App. 8a.

JURISDICTION

The Judgment of the Court of Appeals was entered on January 17, 2006. A timely filed petition for rehearing was denied on February 14, 2006. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

RELEVANT PROVISIONS INVOLVED

Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-2(a)(1) provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer -

> (1) ...to discharge any individual ... because of such individual's race, color, ... or national origin;

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> (c) .... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law....

STATEMENT

A. *Litigation History*

Robin Johal ("Johal") filed a complaint and later an amended complaint against her former employer, Little Lady Foods Inc. ("LLF"), alleging that her discharge by LLF violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e et seq.("Title VII") and the Age Discrimination in Employment Act of 1967, 29 U.S.C. Sec 631 et seq.("ADEA"). The District Court granted LLF's motion for summary judgment on July 29, 2004, App. 8a, and denied Johal's motion for reconsideration on August 30, 2004. Johal filed a notice of appeal on August 30, 2004. Johal appealed only that portion of the summary judgment relating to discrimination based upon race, color, or national origin. LLF filed a motion to strike portions of Johal's brief *inter alia* on the ground that Johal had not raised before the District Court the issue that only evidence introduced by plaintiff should be considered in determining whether a plaintiff meets the elements of a *prima facie* case of discrimination. On July 5, 2005, the Seventh Circuit Court of Appeals denied LLF's motion to strike. App. p. 43a. On January 17, 2006, the Seventh Circuit entered a judgment affirming the grant of summary judgment to LLF. App. p.1a. A timely filed petition for rehearing was denied on February 14, 2006. App. p.42a.

B. *Factual Background*

LLF is a producer of food products, principally frozen pizza. Johal, a native of India, worked for LLF for nearly nine years from August 1992 to July 13, 2001. In 1992 LLF fired George Balsamo as Manager of Quality Assurance for performance reasons. LLF explained to Balsamo that it had

fired him because his position had been eliminated. LLF's then Director of Operations explained to John Geocaris, LLF's President, that position elimination had been used as the explanation for the discharge to reduce the chance of a wrongful discharge claim by Balsamo. LLF had not identified Balsamo's replacement when it fired him. LLF waited six months and hired Johal as Manager of Quality Assurance. Johal had a B.S. degree in food science and technology from the University of Washington and ten prior years of experience in quality assurance. Johal set up the quality assurance department for LLF and headed the department as manager from August 1992 through April 2000. In addition to her quality assurance responsibilities, Johal headed research and development without specific job title for four and one half years (from Summer 1993 through Summer 1995, from Summer 1996 through the end of 1997, and from January 1999 until April 2000). Johal consistently received oral performance evaluations of "good" or "excellent" while she was Manager of Quality Assurance.

Because LLF was growing and the functions of quality assurance and of research and development were separate and distinct, LLF in April 2000 divided the two functions into separate departments with a manager for each. LLF offered Johal the choice of being either Manager of Quality Assurance or Manager of Research and Development. Johal believed that LLF wanted her to take the research and development position, and she accepted it. According to the job description adopted by LLF on October 19, 2000, the qualifications for the research and development manager were a bachelor's degree in food science technology plus at least four years of research and development experience. LLF hired a new Manager of Quality Assurance. LLF allocated responsibility for United States Department of Agriculture (USDA) compliance to the quality assurance department upon the division of the two functions.

In mid 2000 H.J. Heinz ("Heinz") approached LLF to produce a line of frozen diet pizzas. Heinz brought its own recipes. The role of the research and development department in the Heinz project was to source the ingredients for production. Johal started the research and development work on the Heinz project in August 2000 and completed that work by December 2000. Production of products for Heinz began in March 2001. Production problems arose as a result of the strict requirements for calorie count, but those problems related to quality assurance, rather than to research and development.

LLF gave Johal her first and only written performance review on January 18, 2001. The performance review used a four point rating scale with 4 being Exceeds Standard, 3 being Meets Standard, 2 being Needs Some Improvement, and 1 being Urgently Needs Improvement. The review evaluated 11 job elements. Out of the eleven categories Johal received two 4's, seven 3's, one 2.5 and one 2. The average of the 11 ratings was 3.045. The review gave some praise but also listed areas for improvement. The review authorized a $5,704 bonus (more than 10% of Johal's base compensation), including a $1,000 Special Extra Bonus for work on the Heinz project. The review states with respect to Heinz "Excellent job!!!" and further notes, "Nice job with Heinz, Leona's, Pancake Café, etc."

For performance reasons LLF fired the new Manager of Quality Assurance in February 2001 and hired an employee with the title of "consultant" for the quality assurance department. In the same month LLF removed Johal from the management committee. After LLF fired the Manager of Quality Assurance, Johal attempted to assist with Heinz quality assurance issues. Johal, however, had difficulty because the former manager had initiated changes in quality assurance procedures which had not been fully implemented and with which neither Johal nor the plant was familiar. LLF submitted evidence of complaints about Johal's performance; however, the

record contains no documentary evidence of the purported complaints.

On April 1, 2001, LLF adopted a job description for a Director of Technical Services. The job description incorporated nearly verbatim all of the duties on the job description for the Manager of Research and Development, as well as the duties of the then vacant position of Manager of Quality Assurance. It also provided for the integrated management of the two functions. The job qualifications were a bachelor's degree in food science and technology plus at least ten years combined quality assurance and research and development experience. No culinary education or experience was required.

On May 15, 2001, a newly hired Director of Technical Services started to work. On the same day the USDA shut down one of LLF's plants for a week as a result of documentation failures that occurred during the tenure of the recently fired Manager of Quality Assurance. For the next six weeks the newly hired Director of Technical Services spent 80% of her time working on USDA compliance. After May 15, 2001, Johal worked on continuing projects, but thereafter LLF gave her no new projects. LLF fired Johal on July 13, 2001. LLF's then stated reason for Johal's discharge was the elimination of her position. Johal declined to accept a severance package offered by LLF.

According to LLF's factual statement to the District Court, "After Johal was discharged, the responsibilities of the Research and Development Manager position were primarily handled by the Lead R&D Technician, Elizabeth Valezquez, and the Director of Technical Services, Paula Gerlat." At the start of 2001, the research and development department did not have a trained chef on staff. LLF contracted out special needs for a chef. According to LLF's factual statement to the District

Court, "Little Lady Foods hired Niki Bava as the Corporate Chef and to supervise R&D Technicians in the third or fourth quarter of 2001." Bava had graduated from a junior college in 2001 and had no experience in the food industry prior to 2000.

LLF struggled economically in the 1990's. It then paid wages which were in the low range of wages for most positions. In part as a result of the successful introduction of the Heinz line of diet pizzas, LLF's sales and profits increased in 2001 over the levels in 2000. Retained earnings shifted from negative at the start of 2001 to positive at the end of the year. Johal's base annual salary was $52,600 as of December 31, 2000, and $55,000 as of June 30, 2001.

On April 10, 2000, Robert Gannett retired as Vice President of Operations for LLF. Five of the six managers, including Johal, who then reported in the line of command to Gannett, were Asian, African American, or Hispanic. In the period starting with Gannett's retirement and ending on Johal's discharge on July 13, 2001, LLF either fired, demoted or forced to change positions each of the five minority managers who had reported to Gannett just prior to his retirement. In its presentation to the EEOC LLF stated, "Little Lady Foods employs 193 individuals in a wide variety of positions. Of the 193 employees, 127 are Hispanic, 51 are Caucasian, 10 are of Asian ancestry, and 5 are African American." When asked to break down employment by job category, LLF disclosed that all eight of the officer/senior management were Caucasian, all three of the director level employees were Caucasian, and of the six manager level employees four were Caucasian and two were Hispanic. By the date selected by LLF for its employee census submitted to the EEOC in this case, the number of management employees who were Asian, African American, or Hispanic had been reduced from at least five on April 10, 2000 to two out of a total of 17 management employees. As prosperity increased for LLF, the number of minorities in management decreased.

John Geocaris, the President of LLF and the decision maker, confirmed in his deposition on July 17, 2003, that performance was not related to Johal's discharge. When asked, "Did you give her [Johal] a verbal warning of her problems with performance?", Geocaris responded, "I'm not aware if we did or not. But this wasn't related to her termination; she was terminated because her position was eliminated."

The facts set forth herein were included in Johal's Brief, in the Appendix to Johal's Brief, or in LLF's brief.

REASONS GRANTING THE PETITION

I. This Court should grant certiorari to make explicit the principle grounded in *McDonnell Douglas v. Green* that inherent in the right of a plaintiff to have a full and fair opportunity to present evidence of pretext is the obligation of an appeals court to set forth and to analyze that evidence of pretext in making a *de novo* review of a grant of a motion for summary judgment even in face of the business judgment rule.

A. *Failure to Make a Complete Pretext Analysis.*

The Seventh Circuit Court of Appeals addressed the fact intensive issue of pretext in a single, six sentence paragraph, as follows:

> Second, Johal argues that one of the nondiscriminatory reasons LLF cited for discharging her – that it had eliminated her position – was pretextual. Specifically, she contends that a genuine issue of material fact exists about whether LLF eliminated her former position as R&D manager. *But the record does not support an inference of pretext. It shows that the company's business demands were growing and*

> *changing and that Johal's former responsibilities were distributed among three other positions as part of an overall restructuring of job functions and reporting lines.* Moreover, it is not our role to question the wisdom of a company's decisions on how to run its business, only to assure that such decisions are not intended to provide cover for illegal discrimination. *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F. 3d 672, 676 (7th Cir. 1997). We find no basis for Johal's claim that the elimination of her position was pretext for a discriminatory discharge. (Emphasis added)

Without setting forth any of the evidence introduced by Johal to demonstrate pretext or discussing any case cited by her in support thereof, the Seventh Circuit stated LLF's nondiscriminatory reason for discharging Johal (elimination of her position), set forth the evidence which articulated that reason (business growth, job restructuring, and redistribution of duties), and reached the conclusion that LLF's reason for discharging Johal was not pretext. The Seventh Circuit found the lack of support for an inference of pretext in the evidence of LLF and not in the analysis of Johal's arguments. The elimination of the position of Manager of Research and Development was the only explanation for Johal's discharge set out in LLF's discussion of pretext in its Brief.

The heart of *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) and its progeny is that through the establishment of a *prima facie* case of discrimination and the introduction of sufficient evidence to demonstrate that the legitimate reasons offered by the defendant were not its true reasons but instead were pretexts for discrimination, a plaintiff can prove circumstantially that a defendant intentionally discriminated against the plaintiff in an action based upon Title VII. *McDonnell Douglas v. Green, supra*, and *Reeves v. Sanderson Plumbing Products, Inc.*, 530

U.S. 133, 120 S.Ct. 2097, 147 L.Ed. 2d.105 (2000). Proof of unlawful discriminatory intent does not require direct evidence. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed. 2d 403 (1983).

Johal's primary evidence to demonstrate pretext for discrimination is that after her firing, 100% of her duties as described in her job description remained intact as a part of the position of Director of Technical Services, created and filled just two months prior to her discharge. While the new position had duties in addition to those of the Manager of Research and Development, Johal was qualified to perform all of the duties of the new position. LLF did not replace the position of Manager of Research and Development; it replaced Johal.

The position of Director of Technical Services was in fact the reestablishment of the job which Johal had held from January 1999 through April 2000. The duties and responsibilities section of the job description for the Director of Technical Services contained three parts. The research and development part incorporated nearly verbatim all of the duties and responsibilities in the job description for Johal's position of Manager of Research and Development. The quality assurance part included the substance of the duties of the Manager of Quality Assurance. The technical services part provided for the appropriate integration of quality assurance and research and development, for budgeting and for sales and marketing assistance. Johal was qualified (1) to perform the research and development portion of the Director of Technical Services because she held the job of Manager of Research and Development, (2) to perform the quality assurance portion because previously she had performed satisfactorily as Manager of Quality Assurance for LLF for seven and one half years, and (3) to integrate the two functions because previously she had headed the two departments simultaneously for four and one half years. In addition, Johal met the educational and

experience requirements for the position of Director of Technical Services because she had nearly 20 years of experience and a degree in food science. LLF merely recombined the two distinct departments which it had separated just one year earlier. LLF took part of Johal's duties away when it separated quality assurance from research and development in April 2000; it took away all of her duties two months after it reconsolidated the two positions in May 2001.

When, near to the time an employer purportedly eliminates a position, it creates a new position which incorporates all the duties of the purportedly eliminated position, a comparison of the two positions is a means whereby a plaintiff can demonstrate that the elimination of the old position was a pretext. If the newly created position includes all of the duties of the old position and if the holder of the old position is qualified to perform all of the duties of the new position including new duties which had not been a part of the old position, a factual issue exists as to whether a newly created position is a continuation of an older position . *Quaratino v. Tiffany & Co.*, 71 F 3d. 58 (2nd Cir. 1995) and *Garcia v. Pueblo Country Club*, 299 F. 3d. 1233 (10th Cir. 2002).

As additional evidence of pretext, Johal, *inter alia*, pointed to LLF's prior false use of position elimination as a justification for the discharge of George Balsamo in 1992. Even though Balsamo had performed poorly, LLF told Balsamo that his position (for which Johal six months later was hired) had been eliminated. LLF gave the false explanation to Balsamo to reduce the chance that Balsamo would assert a wrongful discharge claim against LLF. Articulation once of elimination of a position as a false reason for firing an employee makes suspect a second but later articulation of the same reason as explanation for the firing of another employee. See *Bellaver v. Quanex Corp.*, 200 F 3d. 485, at 494 (7th Cir. 2000), where the false use in 1992 of a one person mini reduction in force as

the justification for the firing of an employee was evidence that use five years later of the same explanation for the firing of an employee could be evidence of a pretext for discrimination.

In the instant case the Seventh Circuit failed to discuss the comparison of the old position of Manager of Research and Development with the newly created position of Director of Technical Services. The Court also failed to discuss the prior discharge of Balsamo. Johal presented factual and case law support for the proposition that each fact pattern evidenced pretext. Omission of a class of evidence from the discussion of an issue is a silent holding that the omitted material is irrelevant and unrelated to the issue being considered. In *Reeves v. Sanderson Plumbing Products, Inc., supra*, at 146, this Court, in reversing the circuit court, inferred that the Fifth Circuit had adopted the "pretext plus" theory of proving discriminatory intent. That inference was based upon the evidence which the Court of Appeals had ignored and not solely upon the statement of legal principles set forth in the opinion. The omission of evidence by the Fifth Circuit in *Reeves* defined the underlying governing principle.

Here, the unstated holding implicit in the opinion of the Seventh Circuit is as significant as the unstated principle had been in the Fifth Circuit's opinion in *Reeves, supra*. By omitting from discussion the evidence presented by Johal to show pretext, the Seventh Circuit held as a matter of law that the evidence which supported LLF's explanation of its reason for firing Johal (elimination of her position) was sufficient to overcome any and all evidence of pretext presented by Johal.

The Seventh Circuit in this case declined to discuss Johal's evidence of pretext because it would not "question the wisdom of a company's decisions on how to run its business". App. p. 4a. Deferral to legitimate business judgment may justify rejection of arguments to show pretext in some cases.

Here, however, two flaws exist in the analysis by the Seventh Circuit. First, only after a court sets forth and discusses the evidence supporting the argument presented, can it logically and properly classify an argument as a challenge to the wisdom of a business decision. Rejection of the argument prior to discussion is premature. Second, the arguments presented by Johal do not contest the wisdom of LLF's actions. Johal questions (1) whether a comparison between the duties of the Manager of Research and Development and the duties of the Director of Technical Services shows that LLF did not factually and functionally eliminate the position of Manager of Research and Development and (2) whether LLF's past false use of "elimination of position" demonstrates that the current use of "elimination of position" could be pretext.

Exposition of the evidence presented by the employer cannot be a substitute for discussion of the evidence presented by the employee to establish pretext. Even if true, the evidence given by LLF for Johal's discharge would not preclude a finding that unlawful discriminatory intent motivated her discharge. Proof that the facts underlying the reasons given for an employer's adverse employment action are false is not the only way to show that the reasons are pretextual. The reason stated by an employer for its employment action does not limit the scope of the evidence which an employee can use to show pretext. In *McDonnell Douglas v. Green, supra*, it was undisputed that plaintiff had engaged in unlawful and disruptive conduct directed against the employer and that such conduct was the stated reason for the allegedly discriminatory employment action taken; nevertheless, the plaintiff, upon remand, was afforded an opportunity to demonstrate that the reason assigned was pretext. The facts underlying the stated reason were true, but this Court required an analysis of pretext. This Court listed four categories of evidence which could be used to prove pretext even when the facts supporting the articulated reason for discharge were true. *McDonnell Douglas*

v. Green, supra, at 804-5.

Irrespective of whether the facts articulated by the employer to establish a legitimate nondiscriminatory reason for its employment action are true or false, the determination of intent should be made only after consideration of the employee's evidence of pretext. This case presents the converse of the situation in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). There, a false stated reason for a discharge when combined with proof of a *prima facie* case of discrimination did not compel a finding of unlawful discrimination. The false reason given for an employer's decision to fire an employee was a factor to be considered in determining the ultimate issue of the employer's intent; but it was not conclusive proof of intent because reasons other than unlawful discrimination (personal dislike of the particular employee) could have motivated the employer's actions. Conversely, the truth of the evidence introduced to articulate a legitimate nondiscriminatory reason for firing an employee is likewise only a factor to be considered in deciding the ultimate issue of intent. It is not conclusive proof of an employer's intent. Truth of the evidence introduced by the employer to articulate its reasons for its employment action does not compel a finding for the employer.

Johal's evidence of pretext, at the least, warranted discussion. If an employer can (1) place all of the duties of an existing position into a new position with added duties which the holder of the existing position is qualified to perform, (2) hire a new employee to fill the newly created position, (3) fire the first employee after a short interval on the ground of elimination of the original position, and (4) be exempt from a pretext analysis because the employer exercised business judgment in reorganizing job functions and reporting lines, then the court has provided a blueprint for eliminating protection under the various discrimination acts for management

employees with unique jobs. Management functions, particularly in small companies, overlap; and it is relatively simple to shuffle some duties among the various positions.

When the Court of Appeals stopped its analysis at the evidence produced by LLF, it failed to complete (1) the assessment of the evidence of pretext presented by Johal and (2) the analysis required by *McDonnell Douglas v. Green, supra.* In a motion for summary judgment, an opportunity to present evidence of pretext is meaningless unless a court has a corresponding obligation to review and consider the evidence presented to prove pretext. A reviewing court manifests its consideration of facts relating to pretext by setting forth the applicable evidence and by explaining its analysis of that evidence.

B. *Failure to Review the Evidence as a Whole.*

Celotex Corporation v. Catrett, 477 U.S. 317 at 322, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986), sets forth the basic standard for determining whether summary judgment is appropriate either initially at the district court level or upon *de novo* review upon appeal, "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." In determining whether summary judgment should be granted, the court must review the record "taken as a whole." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed. 2d. 538 (1986). In reviewing a motion for summary judgment, "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, at 255, 106 S.Ct. 2505, at 2513, 91 L. Ed. 2d. 202 (1986).

Comparisons of the facts set out and relied upon by the Seventh Circuit (1) with the facts set forth in this petition and (2) with the facts set forth in the Memorandum Opinion and Order in the District Court demonstrate that the Seventh Circuit did not review the record taken as a whole. The adequacy of the factual review given by the Seventh Circuit should be measured against the detailed factual statements found necessary and appropriate in the discriminatory discharge cases decided by this Court - *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d. 207 (1981) (Both failure to promote and wrongful discharge), *St. Mary's Honor Center v. Hicks, supra*, (Wrongful discharge), and *Reeves v. Sanderson Plumbing Products, Inc., supra*, (Wrongful discharge).

The Seventh Circuit failed to consider critical evidence favorable to Johal: (1) that the research and development portion of the job description for the Director of Technical Services was nearly identical to that of the Manager of Research and Development and (2) that LLF had previously falsely claimed the elimination of a position as the explanation for the discharge of George Balsamo. The conclusion that "Johal's former responsibilities were distributed among three other positions as part of an overall restructuring of job functions and reporting lines." App. p. 4a. is not the most favorable justifiable inference which could be drawn in favor of Johal from the evidence presented by Johal. The "reorganization" only became possible after the hiring, two months before Johal's firing, of an employee who had been assigned all the duties of Johal's position as Manager of Research and Development. The corporate chef was not hired until after Johal's discharge, and the individual hired had only just graduated from a junior college and had minimal experience in the food industry. The corporate chef did work which prior to her hiring had been out sourced. The Seventh Circuit to the detriment of Johal integrates as a single "reorganization" the hiring of the Director

of Technical Services in April 2001, the firing of Johal on July 13, 2001, and the hiring of a corporate chef in the third or fourth quarter of 2001.

The opinion of the Seventh Circuit reads more like a decision rendered after weighing the evidence than a *de novo* review in which all reasonable inferences are drawn in favor of Johal.

C. *Conclusion - Pretext Analysis.*

When the Seventh Circuit addressed the issue of whether LLF's explanation for its firing of Johal was credible without consideration of evidence of pretext presented by Johal, it decided the ultimate issue in the case. In so doing, it failed (1) to make the complete analysis required by *McDonnell Douglas v. Green, supra,* and (2) to review the record as a whole as required by *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., supra,* at 587. To have an argument rejected after discussion is a hazard of litigation; to have an argument, supported by facts and case law, ignored is unfair. The opinion of the Seventh Circuit contains hardly a hint of Johal's evidence of pretext.

This Court should grant certiorari because the Seventh Circuit has decided an important federal question (the scope of the review of evidence of pretext in an employment discrimination case) in a manner that conflicts with relevant decisions of this Court. Because the Seventh Circuit justified its omission of consideration of Johal's evidence of pretext based upon the business judgment rule, the issue is more than a misapplication of a properly stated rule of law. The abbreviated factual statement and the deferral to business judgment is an over-extension of a trend to limit access to juries for employment discrimination claimants. Every business action represents the exercise of a business judgment. Limits need to

be placed upon the application of the business judgment doctrine; that doctrine should not be allowed to foreclose consideration of evidence supporting a showing of pretext. The business judgment rule does not supercede the established rules of *McDonnell Douglas v. Green* or of summary judgment.

II. **This Court should grant certiorari to resolve a conflict among the circuits about the evidence necessary to establish the "qualification" element of a *prima facie* case pursuant to *McDonnell Douglas v. Green, supra,* in the claim of an alleged discriminatory discharge and to apply the applicable qualification standard correctly.**

A. *Introduction - **Prima Facie** Case Issues.*

As an alternate basis for affirmance of the grant of summary judgment, the Seventh Circuit held that Johal failed to meet the qualification element of the *prima facie* case. The Court did not discuss any element of the *prima facie* case other than qualification. The Seventh Circuit stated the qualification element as "(2) she was performing her job satisfactorily" App. p. 3a; the District Court stated the qualification element as "(2) she was performing the functions of her job satisfactorily". App. p. 31a. Both opinions cite *Michas v. Health Cost Controls of Illinois, Inc.* 209 F. 3d 687, 693 (7th Cir. 2000), which defines the second element as "(2) he reasonably performed to his employer's expectations." Satisfactory performance is a short-hand expression of the legitimate expectations test described below.

B. *Conflicting Standards for the Qualification Element of **Prima Facie** Case in a Discharge Case.*

Pursuant to *McDonnell Douglas v. Green, supra,* at 802, a rejected job applicant establishes a *prima facie* case of discrimination "by showing (i) that he belongs to a racial

minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." The first element of the *prima facie* case identifies the protected class of the plaintiff. The second element is the employment action taken by the job applicant. The third element is the response of the employer. The fourth element is the circumstances which imply discrimination. The continuing search for a new employee after rejection of a job applicant in a protected class raises an inference of discrimination.

This Court in *Texas Department of Community Affairs v. Burdine*, *supra*, addressed the issue of the evidence which an employer must submit to rebut a *prima facie* case. However, as a prelude to that discussion, this Court at 253-4 provided a description of the role of the *prima facie* case in the hiring or promotion scenario:

> The burden of establishing a *prima facie* case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. The *prima facie* case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for plaintiff's rejection. See *Teamsters v. United States*, 431 U.S. 324, 358, and n. 44, 97 S.Ct. 1843, 1866 and n. 44, 53 L.Ed.2d. 396 (1977).

Four observations must be noted. First, the burden of establishing a *prima facie* case is not intended to be "onerous".

Second, the need to prove facts "by a preponderance of the evidence" applies when issues are submitted to the trier of fact, not to preliminary stages when facts would be viewed in the light most favorable to the employee upon any motion by the employer. Third, the key point is that the *prima facie* case must set forth facts "which give rise to an inference of discrimination" which arises from the facts of the fourth element of the *prima facie* case. Fourth, the two common nondiscriminatory reasons set out in *Teamsters v. United States*, *supra*, are a lack of qualifications and the absence of a vacancy. In a failure to hire case, both of those factors are subject to proof by objective standards.

The *prima facie* case for a failure to hire does not require the exhaustion of all potential legitimate and common reasons; it omits the subjective question of comparative qualifications of the job applicants from consideration. Unless either the applicant pool is smaller than the number of positions available or the employer has a policy to hire the first available minimally qualified applicants, the relative qualifications of the applicants within the applicant pool will be a factor in a hiring decision. The *McDonnell Douglas v. Green prima facie* case for failure to hire, however, does not require any evidence about the comparative qualifications of the candidates, even though lower comparative qualifications held by a rejected applicant would be a common and normal justification for the failure to hire a particular candidate.

The adjustments necessary to convert the *prima facie* case for failure to hire to a *prima facie* case for discharge are mostly settled for the first, third and fourth elements. The first element remains unchanged. A plaintiff still needs to identify his or her protected class. The third element changes from a failure to hire to the discharge itself. The fourth element in the failure to hire situation, the continuing search for a similarly qualified worker, becomes one of replacement of the worker in

the normal setting, retention of a similarly situated worker outside of the protected class in a reduction in force, or assignment of the job functions to a person outside of the protected class in a mini-reduction in force. A conflict exists among the circuits about whether a "legitimate expectations test" or an "objective qualifications" test should define the adjustments required to the second element of the *prima facie* case on account of a shift from failure to hire to discharge.

The "legitimate expectations" test originated in *Loeb v. Textron, Inc.* 600 F. 2d 1003 (1st Cir. 1979). The Court in *Loeb* looked at footnote 44 in *International Brotherhood of Teamsters v. United States*, 431 U.S.324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977), which states in pertinent part:

> Although the McDonnell Douglas formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought.

The Court reasoned that performance deficiencies were common reasons for discharge of an employee and, accordingly, added a new element to the required *prima facie* case applicable in discharge cases: "Complainant would be required to show that he was 'qualified' in the sense that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative." *Id* at 1013. The Court in *Loeb* formulated the additional element of the *prima facie* case for discharges as, "he was performing his job at a level that met his employer's legitimate expectations." *Id* at 1014.

The Seventh Circuit adopted the "legitimate expectations" standard for discharge cases in *Kephart v. Institute of Gas Technology*, 630 F. 2d 1217 (7th Cir. 1980). Two other circuits, the Fourth Circuit in *Warch v. Ohio Casualty Insurance Company*, 435 F. 3d. 510 (2006), Petition for Certiorari filed May 1, 2006, No. 05-1387, and the Ninth Circuit in *Douglas v. Anderson*, 656 F 2d 528 (1981), currently also follow the "legitimate expectations" rule. The Fourth Circuit in *Warch, supra*, at 514-17, restates and updates the reasons for the "legitimate expectations" test.

The "objective qualifications" standard usually has two elements: first, maintenance of the qualifications necessary for the performance of a job; and second, deferral of consideration of material presented by the employer until the pretext stage. The leading case setting out the "objective qualifications" test is *Bienkowski v. American Airlines*, Inc., 851 F. 2d 1503 (5th Cir. 1988), where the Fifth Circuit concluded, "Consequently, a plaintiff challenging his termination or demotion can ordinarily establish a *prima facie* case of age discrimination by showing that he continued to possess the necessary qualifications for his job at the time of the adverse action." Id. at 1506. The Court continued in a footnote, "By this we mean a plaintiff had not suffered physical disability or loss of professional license or some other occurrence that rendered him unfit for the position for which he was hired." Id. at footnote 3. The Court concluded, "Placing a plaintiff's 'qualifications' in issue at both the *prima facie* case and pretext stages of a termination case is unnecessary redundancy." Id. at 1505.

Although the emphasis varies from case to case and from circuit to circuit, Courts of Appeal in five other circuits have adopted the substance of the "objective qualifications" test: the Third Circuit in *Siegel v. Alpha Wire Corporation*, 894 F. 2d 50 (3rd Cir. 1990) (Continuing qualifications at 53; consideration of employer's evidence at pretext stage at 54); the

Sixth Circuit in *Wexler v. White's Fine Furniture, Inc.*, 317 F. 3d 564 (6th Cir. 2003) (Continuing qualifications at 575-576; consideration of employer's evidence at pretext stage 574-575), the Tenth Circuit in *MacDonald v. Eastern Wyoming Mental Health Center*, 941 F. 2d 1115 (10th Cir. 1991) (Continuing qualifications at 1121; consideration of employer's evidence at pretext stage at 1119); the Eleventh Circuit in *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354 (11th Cir. 1999) (Continuing qualifications at 1360; consideration of employer's evidence at pretext stage at1360); and the District of Columbia Circuit in *Coburn v. Pan American World Airways, Inc.*,711 F. 2d 339 (D.C. Cir. 1983) (Consideration of employer's evidence at pretext stage at 343).

The Sixth Circuit in *Wexler, supra*, the most recent of the cases cited, concisely sets forth at 575 the applicable continuing qualification principle: "At the *prima facie* stage, a court should focus on a plaintiff's objective qualifications to determine whether he or she is qualified for the relevant job."(Emphasis in original). *Wexler, supra*, at 575, enunciates, as well, the requirement to review the employer's evidence as a part of pretext:

> First, a court may not consider the employer's alleged nondiscriminatory reason for taking an adverse employment action when analyzing the *prima facie* case. To do so would bypass the burden-shifting analysis and deprive the plaintiff of the opportunity to show that the nondiscriminatory reason was in actuality a pretext designed to mask discrimination.

Case law in the Second Circuit supports both the "legitimate expectations" test, *Thornley v. Penton Publ'ing, Inc.*, 104 F 3d 26 (2nd Cir. 1997), and the "objective qualifications" test, *Slattery v. Swiss Reinsurance America Corp.*, 248 F 3d 87 (2nd Cir. 2001). Lower courts have followed both lines of

authority as illustrated in *Darboe v. Staples, Inc.* 243 F. Supp. 2d 5, at 11-14 (S.D.N.Y, 2003). Split authority also exists in the Eighth Circuit. *Whitley v. Peer Review Sys., Inc.*, 221 F. 3d 1053 (8th Cir. 2000) adopts the "legitimate expectations" test, while *Legrand v. Trustees of Univ of Arkansas*, 821 F 2d. 478 (8th Cir. 1987), utilizes the "objective qualifications" test. *Cherry v. Ritenour School District*, 253 F. Supp. 2d 1085 (E.D. Mo. 2003), notes the conflicting lines of authority.

The three Supreme Court decisions which addressed allegedly discriminatory discharge - *Texas Department of Community Affairs v. Burdine, supra* (Both failure to promote and wrongful discharge), *St. Mary's Honor Center v. Hicks, supra*, and *Reeves v. Sanderson Plumbing Products, Inc., supra*, - each reviewed cases submitted to the fact finder. As a result, the existence of a *prima facie* case was not considered. Each of the three recited that the "qualification" element of the *prima facie* case had been met by the discharged employee being qualified for his job prior to firing. *Burdine* and *Reeves* each originated in the Fifth Circuit, which always has used the "objective qualifications" test. *Hicks* originated in the Eighth Circuit, when the "objective qualifications" test as stated in *Legrand, supra,* was the governing precedent.

In summary, four Circuits, including the Seventh Circuit, follow the "legitimate expectations" test, six Circuits follow the "objective qualifications" test, and two circuits follow both tests inconsistently. As long as any fired employee attempts to prove that his or her discharge was the result of discriminatory intent based upon the *McDonnell Douglas v. Green* indirect method, the issue of the appropriate test for the qualification element of the *prima facie* case will recur.

The selection of the "legitimate expectations" test or the "objective qualifications" test is a policy issue. A uniform standard should apply for all circuits and within each particular

circuit. This Court created the *McDonnell Douglas v. Green* burden-shifting allocation procedure; this Court consequently should select a uniform standard for presenting the minimum qualifications necessary for a *prima facie* case for allegedly unlawful discharge.

The continued operation for many years of the "objective qualifications" test and of the "legitimate expectations" test shows that each test is workable. The purpose of Title VII is to protect workers from prohibited discrimination. See *McDonnell Douglas v. Green, supra,* at 800-1. Where two workable alternative adjustments to the qualifications element of the *prima facie* case are available, adoption of the test which is more favorable to the employee is consistent with the Title VII goal of protecting workers from unlawful discrimination. Because it is less onerous to meet, the "objective qualifications" test is more favorable to the employee. This Court should adopt it.

This Court should balance the potential harm arising from misapplication of the "legitimate expectations" test to a fired employee (erroneously dismissed claim) against the potential harm arising from the misapplication of the "objective qualifications" test to an employer (disclosure of the reasons for firing the employee which can be rectified at the pretext stage). The employer knows the reason for the discharge. It is more efficient for the employer to articulate the actual reason and for the employee to address the stated reason at the pretext stage, than for the employee to speculate about the reasons at the *prima facie* stage. Balancing the harm to the employee of an erroneous dismissal against the harm to the employer of an unnecessary disclosure supports adoption of the workable but less onerous alternative - the "objective qualifications" test.

This Court in *Texas Department of Community Affairs v. Burdine, supra,* at 253-4, enunciated the role of the *McDonnell*

Douglas v. Green intermediate burdens: "The McDonnell Douglas division of intermediate evidenciary burdens serves to bring the litigants and the court expeditiously to this ultimate question [proof of intentional discrimination]." The "legitimate expectations" test adds complexity to the prosecution and disposition of a discriminatory discharge claim and injects three new issues into a case: (1) the definition of the employer's expectations, (2) the legitimacy of those expectations, and (3) compliance with those expectations. *Coco v. Elmwood Care Inc.*, 128 F 3d 1177 (7th Cir. 1997). These new and subsidiary issues become a detour on the journey from the *prima facie* case to the ultimate question of whether an employer has engaged in unlawful discriminatory conduct. The question of the employer's expectations drops out of the case as soon as the employer articulates a reason for firing the employee. The entire query then becomes superfluous. The "legitimate expectations" test unnecessarily transforms a primarily objective test as applied to hiring into a subjective one as applied to discharge.

The New Jersey Supreme Court in *Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 867 A.2d 1133 (2005), rejected the "legitimate expectations" test as a subjective standard and adopted a variant of the "objective qualifications" test. The Court observed that "Of the forty-one jurisdictions (forty states and the District of Columbia) with case law on this subject, only eight (including New Jersey) have adopted the 'employer's legitimate expectations' standard." Id at 451. The Court then surveyed the decisions of the Circuit Courts of Appeal stating (Id at 454):

> What is at the heart of the cases is an underlying unease over making the second prong in a termination case greater than the second prong in a hiring case and thus casting too great a burden on a LAD [Law Against Discrimination] termination plaintiff. That reluctance

> to accept the "employer's legitimate expectations" test at face value springs out of the subjective nature of "expectations" and the difficulty an ordinary plaintiff would encounter in anticipating and bearing his or her burden of producing evidence of what was in the employer's mind.

Legal commentators also favor the "objective qualifications" test. See Larson's Employment Discrimination, 2nd Edition, Sec. 8.08[4] ("... but why shouldn't an employee be presumed qualified for a position for which he or she has already been hired.")

This Court should adopt the "objective qualifications" test. The *prima facie* case in an employment discrimination claim should not be more onerous to establish for a discharged employee in the Seventh Circuit than for a discharged employee in the Third, Fifth, Sixth, Tenth, Eleventh and DC Circuits.

Johal meets the "objective qualifications" test because she meets the requirements specified in the job description for her position. She has a bachelor's degree in food science and more than four years of experience.

C. *Application of the Legitimate Expectations Test.*

Even if this Court were to determine that the "legitimate expectations" test applies, Johal also meets that test. Johal presented three facts to show that she had met LLF's legitimate expectations. First, LLF explained her firing at the exit meeting as the result of elimination of her position, without reference to performance issues.

Second, LLF paid Johal a discretionary bonus of $3,500 when it fired her. What could be a better statement of fulfilling expectations? The bonus was authorized at the time of firing

and represented over 12% of Johal's base compensation for the first six months of 2001. The Seventh Circuit implies that the bonus could be severance pay. Treating the bonus as severance pay violates the requirement that inferences must be drawn in the light most favorable to the opponent of the motion for summary judgment. The assertion that the bonus could be severance is contrary to the evidence. Johal declined the severance package offered by LLF. Is it reasonable to infer that the bonus is severance after Johal declined a severance package?

Third, the January 18, 2001, performance review rated Johal as exceeds standard on 2 job elements, meets standard on 7 job elements, and needs improvement on 2 job elements. It authorized a $5,704 bonus, including a $1,000 special bonus for work on the Heinz project. While the review listed areas for improvement, it also stated "Excellent job!!!" for work on the Heinz project. The Seventh Circuit first disregarded the review because LLF gave it six months prior to the discharge. The review, however, was the one immediately preceding the firing and no intervening written review rebuts the January 18, 2001, review. The Seventh Circuit next states that Johal's duties changed between the date of the review and the date of discharge. While the hiring of the Director of Technical Services with overlapping duties could have cut back on Johal's duties, any potential cut back had not occurred because the Director of Technical Services spent 80% of her time during her first six weeks of employment working on a quality assurance problem. The Seventh Circuit finally asserts that Johal's supervision changed in the six months prior to her firing. While LLF did change Johal's reporting from the Vice President of Sales to the Director of Technical Services, this reporting shift would not change Johal's job responsibilities.

The Seventh Circuit failed to draw all justifiable inferences in Johal's favor as required by *Anderson v. Liberty*

Lobby Inc., supra, at 255. Taking the facts in the light most favorable to Johal, a genuine question of fact exists about whether she met LLF's legitimate expectations at the relevant time.

III. **This Court should grant certiorari to reconfirm the rule that evidence of employment composition can be an element of circumstantial evidence to prove discriminatory intent without the necessity of proving the qualifications of each employee of the employer.**

The Seventh Circuit's analysis of the facts supporting circumstantial evidence of discrimination is incomplete because it does not set out the facts supporting Johal's contentions. The Seventh Circuit's analysis of "statistics" is contrary to precedents of this Court. Johal sought to use employment data to show (1) that no Asian, African American or Hispanic had ever been an officer at LLF, (2) that only one Asian, African American or Hispanic had ever been a director level employee at LLF (3) that the number of managers who were Asian, African American, or Hispanic declined from at least five to two between April 10, 2000 (the date when the Vice President of Operations retired) and the date LLF used for its employee census submitted to the EEOC and (4) that LLF either fired, demoted, or forced to change jobs each of the five minority managers who had reported to Robert Gannett just prior to his retirement on April 10, 2000.

The Court rejected all of the proffered data because of "the failure to provide any information about the relative qualifications of the various upper managers who were retained hired, or demoted." Opinion p. 5 App. p.5a.

McDonnell Douglas v. Green, supra, at 805, states that the composition of a workforce can be reflective of restrictive or exclusionary practices. *Furnco Construction Corporation v.*

Waters, 438 U.S. 567 98, at 580, S.Ct. 2943, 57 L. Ed. 2d 957 (1978), states that an employer can introduce evidence of the racial mix of its workforce to show its motivation and to support the nondiscriminatory explanation of its employment action. *Casarez v. Burlington Northern/Santa Fe Company*, 193 F. 3d 334 (5th Cir, 1999), at Footnote 4 relying upon *Furnco, supra*, urges that the District Court at trial permit a plaintiff to introduce the kind of evidence which Johal seeks to use. See: *Lipchitz v. Raytheon Co.* 434 Mass. 493 at 508-9, 751 N.E. 2d 360 at 373 (2001). (Absence of women in upper management prior to 1993 evidence of discriminatory intent in a disparate treatment case.)

Evidence about the relative qualifications of the various management level employees who were retained, hired, or demoted is relevant to determining the weight given to the proffered "statistics". Johal, however, is using these pieces of evidence as parts of a mosaic which in combination show discrimination. The absence of information, which would impact the weight to be given evidence, should not bar the evidence of statistics. See: footnote 20 in *International Brotherhood of Teamsters v. United States, supra*, at 340, and *Obrey v. Johnson*, 400 F. 3d 691 (9th Cir. 2005) pp. 694-7.

IV. **This Court should consider the facts applicable to the proper legal standard.**

Whether Johal has established a genuine issue of material fact is important only to her. This issue has no national impact. If the Court accepts this case, however, consideration of the facts applicable to the law could ultimately conserve judicial time by avoiding a second review by the Seventh Circuit.

CONCLUSION

This case is appropriate for review by this Court. In most summary judgment decisions in the employment discrimination area at least one ground for granting summary judgment involves the application of the facts to an established principle of law. This case is unusual because significant legal questions precede each factual inquiry. At the *prima facie* case level, this case questions whether the "legitimate expectations" test or the "objective qualifications" test standard governs determination of qualification in a discharge claim. This Court could resolve a long-standing conflict among the circuits. At the pretext level, this case questions the role of the business judgment rule and the obligation to discuss evidence of pretext presented by the employee. This Court could set the limit upon the operation of the business judgment rule. For all of the foregoing reasons, petitioner respectfully requests that this Court grant a Writ of Certiorari to review the Judgment of the Seventh Circuit Court of Appeals.

Respectfully submitted

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(any footnotes trail end of each document)
No. 04-3261
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROBIN JOHAL,
Plaintiff-Appellant,
v.
LITTLE LADY FOODS, INC.,
Defendant-Appellee.

September 12, 2005, Argued
January 17, 2006, Decided

COUNSEL: For ROBIN JOHAL, Plaintiff-Appellant: Arthur H. Anderson, Jr., TENNEY & BENTLEY, Chicago, IL USA.

For LITTLE LADY FOODS INCORPORATED, Defendant-Appellee: David Holmes, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, Chicago, IL USA.

JUDGES: Before COFFEY, EASTERBROOK, and EVANS, Circuit Judges.

OPINION BY: EVANS

OPINION: EVANS, *Circuit Judge*. Robin Johal, who was born Rabinder Sandhu in India in 1952, emigrated to the United States when she was a teenager. By all accounts, she did quite well once she got here, graduating with a B.S. degree in food science and technology from the University of Washington in 1977. She and her husband, Paul Johal, have three children, and the oldest is a student at the University of Chicago's medical school. But to this nice story, a little unpleasantness in the workplace--at least she thinks so--has emerged. And that unpleasantness gives rise to

this case.

Robin Johal was employed in several positions by Little Lady Foods, Inc., (LLF) from 1992 until she was discharged in 2001. She was originally hired as manager of quality assurance but also fulfilled the responsibilities of the company's lead research and development position during several periods when that position was vacant. After a reorganization in 2000, Johal was offered her choice of managing either the quality assurance department or the research and development department. She chose the R&D job.

That same year, LLF began a period of rapid growth and change due primarily to the acquisition of a major new client, H.J. Heinz. Up until that time, the company was fairly small, generally making pizza crusts and pizzas for its own brand, Bravissimo. Now, with a bigger fish to fry, LLF started receiving complaints from Heinz about Johal's performance. As they continued to grapple with the challenges of meeting the more sophisticated requirements of the Heinz account as well as some related problems with the U.S. Department of Agriculture, LLF's top executives considered further reorganization. In April 2001, the company hired a new director of technical services, and Johal was told she would report to this new director. The company also determined that it needed to hire a corporate chef with formal culinary training. During this period, company president John Geocaris received complaints about Johal from her new supervisor as well as from other employees.

In July 2001, LLF decided to eliminate Johal's position as manager of research and development and to distribute the responsibilities of that position among the corporate chef, the director of technical services, and the lead research and development technician. That same month, Geocaris discharged Johal based on her job performance and

the elimination of her position.

In the district court, Johal alleged discrimination on the basis of race, color, national origin, and sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and discrimination on the basis of age in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. In a thorough, 36-page opinion, the district court (Judge Ronald A. Guzman) found no genuine issues of material fact and granted the defendant's motion for summary judgment on all counts. Johal appeals, and our review, as usual, is *de novo*. *Merrill v. Trump Indiana, Inc.*, 320 F.3d 729, 731 (7th Cir. 2003).

In her appeal, Johal gives up her allegations of age and sex discrimination. Describing herself as "an American of Asian descent," she now limits her claims to discrimination based on race, color, and national origin (though sometimes seeming to conflate two or more of these protected classes). From a rather discursive brief, we discern two primary arguments under the "indirect" burden-shifting test for discrimination explained in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), as that test was modified by the mini-reduction-in-force situation we recognized in *Michas v. Health Cost Controls of Illinois, Inc.*, 209 F.3d 687, 693 (7th Cir. 2000). Under this approach, a plaintiff must establish a *prima facie* case of discrimination by showing that (1) she is a member of a protected class, (2) she was performing her job satisfactorily, (3) she suffered a materially adverse employment action, and (4) her job duties were absorbed by employees who were not members of her protected class. The burden of production then shifts to the defendant to show legitimate, nondiscriminatory reasons for its actions. Finally, the burden shifts back to the plaintiff to attempt to show that the defendant's stated reasons are pretextual.

First, Johal argues in various ways that her job performance was satisfactory. She cites a "discretionary bonus" of $ 3,500 she was given at the time of her discharge. However, she provides no evidence about the basis for the bonus or how it was supposedly tied to her performance. We cannot endorse Johal's belief that "when an employer pays a discretionary bonus to an employee at the time of firing that employee, the logical inference is that the employee was meeting the legitimate expectations of the employer at the time of the firing." Since it was offered in the context of an exit meeting with the company president, the bonus looks as much like a form of severance pay as it does a reward purportedly tied to job accomplishments.

Johal reiterates arguments she made below that a written performance review she received 6 months before her discharge was "positive" in its "overall tenor." But as Judge Guzman correctly observed, "what matters in a discriminatory discharge case is not the employee's past performance, but whether she was meeting the company's expectations at the time of her discharge." *See Cengr v. Fusibond Piping Sys., Inc.*, 135 F.3d 445, 452-53 (7th Cir. 1998); *Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332, 336 (7th Cir. 1991). Moreover, both Johal's duties and supervision changed within the 6 months between her review and her discharge.

Second, Johal argues that one of the nondiscriminatory reasons LLF cited for discharging her--that it had eliminated her position--was pretextual. Specifically, she contends that a genuine issue of material fact exists about whether LLF eliminated her former position as R&D manager. But the record does not support an inference of pretext. It shows that the company's business demands were growing and changing and that Johal's former responsibilities were distributed among three other positions as part of an overall restructuring of job functions and

reporting lines. Moreover, it is not our role to question the wisdom of a company's decisions on how to run its business, only to assure that such decisions are not intended to provide cover for illegal discrimination. *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 676 (7th Cir. 1997). We find no basis for Johal's claim that the elimination of her position was pretext for a discriminatory discharge.

Johal also presents a collection of arguments under the "direct" test for employment discrimination, under which she must present circumstantial evidence that permits an inference of discriminatory behavior by the employer. *See Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994).

First, she contends that the director of technical services who was hired in April 2001, Paula Gerlat, should actually be seen as her replacement. But Gerlat was hired in part to supervise Johal, and since Johal never elicited record evidence of Gerlat's race, color, or national origin, we fail to see how Gerlat's hiring provides circumstantial evidence of discrimination.

Second, Johal discusses the racial composition of LLF's management ranks and urges us to infer from these "statistics" that the company's upper management is closed to members of minority groups. But her brief does not rectify the flaw that was fatal on this point in the district court: the failure to provide any information about the relative qualifications of the various upper managers who were retained, hired, or demoted.

Third, Johal says that no non-Caucasian has ever reported directly to company president Geocaris. Leaving aside the fact that, as a person born in India, Johal is legally classified as a Caucasian, such conjecture without more does not amount to circumstantial evidence of discrimination.

Fourth, Johal discerns circumstantial evidence of discrimination in the way LLF distributed its stock appreciation rights. But she does not address the district court's finding that her evidence on this point was incomplete and included no comparison of the qualifications or duties of the employees who received the awards. Even acknowledging that on summary judgment a court must draw reasonable inferences in favor of the nonmoving party, Johal does not provide enough substance to support her claim that the company's plan "discriminated against Johal in particular and non-Caucasians in general based upon race, color, or national origin."

Last, Johal points to what she says are inconsistencies between Geocaris's testimony in this case and various corporate documents. But none of these "inconsistencies," if they can be so labeled, shed any real light on the key issue of discriminatory intent.

In the process of considering summary judgment, the district court struck a number of paragraphs from Johal's statement of facts due to her failure to comply with the requirements of Local Rule 56.1. On appeal, Johal attempts to revive these building blocks of her case by claiming that the district court considered facts beyond those in the parties' summary judgment papers and thus should have considered "all available materials" rather than strictly enforcing Rule 56.1. She also urges that Title VII plaintiffs be cut some slack because "it is not a burden on the district court . . . to consider facts cited in a memorandum [of law] with appropriate references," even if those facts should have come in through a Local Rule 56.1 statement. Even assuming that admitting all Johal's facts would strengthen her legal case and create at least one genuine issue of material fact--a proposition we seriously doubt--we find no error in how the district judge handled the facts and materials before him.

Thus, we conclude that Johal has fallen short of showing that the workplace unpleasantness about which she complains was due to her "race, color, or national origin." Accordingly, the judgment of the district court is AFFIRMED.

02 C 8481
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

ROBIN JOHAL,
Plaintiff,

v.

LITTLE LADY FOODS, INC.,
Defendant.

July 29, 2004, Decided
July 30, 2004, Docketed

COUNSEL: For ROBIN S JOHAL, plaintiff: David Ryan Shannon, Arthur H Anderson, Jr, Tenney & Bentley, Chicago, IL.

For LITTLE LADY FOODS, INC., defendant: David M. Holmes, Sara Amy Weinberg, Wilson, Elser, Moskowitz, Edelman & Dicker, Chicago, IL.

JUDGES: HON. RONALD A. GUZMAN, United States Judge.

OPINION BY: RONALD A. GUZMAN

OPINION:

MEMORANDUM OPINION AND ORDER

Plaintiff Robin Johal has sued Little Lady Foods, Inc. for sex, color, race, national origin and age discrimination in violation of Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.* ("Title VII") and the Age Discrimination in Employment Act of 1967, *29 U.S.C. § 621*

et seq. ("ADEA"). Defendant has moved for summary judgment and has moved to strike Plaintiff's Exhibit C, several paragraphs and sub-exhibit A from Plaintiff's Exhibit D, several paragraphs from Plaintiff's Local Rule 56.1(b)(3)(A) and Local Rule 56.1(b)(3)(B) submissions, and several statements in Plaintiff's response brief. For the reasons provided in this Memorandum Opinion and Order, the Court: (1) grants in part and denies in part the motion to strike Plaintiff's Exhibit C and paragraphs 13-14 and 35-45 of Plaintiff's Local Rule 56.1(b)(3)(B) Statement; (2) grants the motion to strike numerous paragraphs from Plaintiff's Local Rule 56.1(b)(3)(A) submission; (3) grants in part and denies in part the motion to strike numerous paragraphs from Plaintiff's Local Rule 56.1(b)(3)(B) submission; (4) grants in part and denies in part the motion to strike several paragraphs and sub-exhibit A from Plaintiff's Exhibit D; and (5) grants the motion to strike all additional statements of fact in Plaintiff's response brief that are unsupported by evidence in the record. The Court grants Defendant's motion for summary judgment.

FACTS

Unless otherwise noted, the following facts are either undisputed or deemed admitted because the party's response failed to comply with *Local Rule 56.1*, which this Court strictly enforces. The following section does not include any fact that was unsupported by the proponent's citation to the record.

Plaintiff Robin Johal is a fifty-year-old Asian woman, who was born in India and emigrated to the United States with her family when she was a teenager. (Pl.'s LR 56.1(b)(3)(B) P1; Def.'s Ex. U, First Am. Compl. P5.) In 1977, she graduated from the University of Washington with a degree in food science technology. (Pl.'s LR 56.1(b)(3)(B) P2; Pl.'s Ex. A, Johal Aff. P6.) Although Johal speaks

English fluently, her accent indicates that she was born outside the United States. (Pl.'s LR 56.1(b)(3)(B) P3.)

Little Lady Foods, Inc. hired Johal in August 1992 as Manager of Quality Assurance. (*Id.* P48.) She was hired to set up a quality assurance program for the company. (Def.'s LR 56.1(a)(3) P9.) In 1992, Little Lady Foods had sales of less than $ 10 million. (*Id.* P10.) The company primarily manufactured pizza crusts and pizza for Bravissimo, their own pizza line. (*Id.* P11.) At the time Johal was hired, Little Lady Foods did not have a Quality Assurance department, but it did have a Research and Development department that reported to John Geocaris, the company's president. (Def.'s LR 56.1(a)(3) PP12-13.)

Johal reported to Robert Gannett, Vice President of Operations, from the time she was hired until April 10, 2000, when Gannett left the company. (Pl.'s LR 56.1(b)(3)(B) PP57, 68.) When Johal started working at Little Lady Foods, Gina Harper, a Caucasian woman in her late twenties, held the highest rank in the company's Research and Development department and reported to John Geocaris. (*Id.* P49.) During most of the 1990s, John Geocaris acted as the Manager of Research and Development. (*Id.* P24.) Harper left Little Lady Foods in the summer of 1993, at which time Johal assumed Harper's duties as the lead research and development person, in addition to those of her own position as Manager of Quality Assurance. (*Id.* PP49-50.) The responsibilities associated with the two positions differed. (*Id.* P15; Def.'s Ex. B, Johal Dep. at 83.) The Research and Development department was responsible for developing products and setting up initial specifications; whereas, the Quality Assurance department finalized production specifications and implemented production. (Def.'s LR 56.1(a)(3) PP16-17; Def.'s Ex. B, Johal Dep. at 83-84.)

Johal held both positions for approximately two years until the summer of 1995 when Little Lady Foods hired

Elizabeth Johnson to take over the research and development function. (Pl.'s LR 56.1(b)(3)(B) P50.) Johnson was a Caucasian woman in her late twenties and reported to John Geocaris. (*Id.* P51.) When Johnson left Little Lady Foods in the summer of 1996, Johal again performed the research and development function for about two and a half years along with the duties of the Manager of Quality Assurance position. (*Id.* P52.) At the end of 1997, the company hired Jennifer Balanoff, a Caucasian woman in her mid-thirties, to take over the lead research and development function. (*Id.* P53.) Balanoff reported to John Geocaris. (*Id.*) She left Little Lady Foods at the end of 1998, and Johal once again took over the lead research and development position in addition to acting as Manager of Quality Assurance, this time for sixteen months until April 2000. (*Id.* PP53, 54.)

In March 2000, Little Lady Foods hired Kevin O'Rourke to replace Robert Gannett as Vice President of Operations. (Def.'s LR 56.1(a)(3) PP23, 24.) This action prompted changes in the company's reporting structure. (*Id.* P24.) In April 2000, Little Lady Foods decided to separate Quality Assurance and Research and Development into two separate departments, each with its own manager, to accommodate the company's changing needs and continued growth. (*Id.* PP25 - 26.) Shortly after this decision was made, Johal was informed of the reorganization at a meeting with John Geocaris and Daniel Geocaris, the Vice President of Sales and Marketing. (*Id.* P27; Pl.'s LR 56.1(b)(3)(B) P58). n1 At the meeting, John Geocaris offered Johal the choice of managing either the Quality Assurance department or the Research and Development department. (Pl.'s LR 56.1(b)(3)(B) P59.) Johal chose to accept the Research and Development position and started in that position about two weeks later. (Def.'s LR 56.1(a)(3) P30.) In the summer of 2000, Little Lady Foods hired Elisa Loconte to manage the Quality Assurance department. (*Id.* P31; Pl.'s Ex. B, Sub-ex. 9, Loconte Resume.)

In her new position, Johal reported to Daniel Geocaris. (Def.'s LR 56.1(a)(3) P32.) As manager of Research and Development, Johal was responsible for working with customers and other departments within the company to develop new products and for resourcing raw materials. (*Id.* PP33 - 34.) She was also responsible for developing acceptable product prototypes for customers. (*Id.* P35.) Moreover, she managed one or two assistants. (*Id.* P36.)

In July 2000, Little Lady Foods began negotiations with HJ Heinz to manufacture its Weight Watchers SmartOnes Pizza line. (Pl.'s LR 56.1(b)(3)(B) P79.) Heinz's total food sales volume exceeded that of any of Little Lady Foods' other customers and the SmartOnes line had the potential to become the company's leading sales product. (*Id.* P80.) Heinz was also the most complex customer Little Lady Foods had in 2001. (Def.'s LR 56.1(a)(3) P66.) The account required the production of five different pizzas. (*Id.* P67.) Because SmartOnes Pizza was a dietary product, Heinz had its own culinary team in San Francisco develop the recipes. (*Id.* P70.)

Johal, John Geocaris, and members of the sales department met with Heinz representatives to discuss production of the pizza line. (Def.'s LR 56.1(a)(3) P39.) Johal began the research and development work for SmartOnes in August 2000. (Pl.'s LR 56.1(b)(3)(B) P81.) By the end of December 2000, she located a source for supplying the product's crust that Heinz found acceptable. (*Id.* P85.) The first sales of the product occurred in March 2001. (*Id.* P68.)

After Johal took over as manager of Research and Development, Little Lady Foods began to receive complaints from customers about her performance, and the company's internal sales associates began to complain that she lacked the technical knowledge necessary for product development. (Def.'s LR 56.1(a)(3) P41.) These complaints started in April 2000 and continued through July 2001. (*Id.* P74.) Specifically, Susan Kay, the Product Development Specialist

for Heinz who worked with Johal on product development, complained that Johal was unable to follow directions, lacked good judgment, and failed to check her work. (*Id.* PP75-77). n2 Daniel Geocaris met with Johal to discuss these complaints. (*Id.* P44.) Her performance review from August 29, 2000 indicated that she had done a nice job with Heinz but also noted areas of deficiency. (*Id.* P46.) The review contained the phrase "Excellent Job! " in reference to Johal's work with Heinz. (*Id.* PP47, 48.) It also stated that Johal had done a "nice job with Heinz, Leona's, Pancake Cafe, etc." (Pl.'s LR 56.1(b)(3)(B) P88.) Johal's January 18, 2001 performance review stated that she needed to improve her technical knowledge, "show more creativity with recipes when necessary," and "develop a rapport with all managers." (Def.'s LR 56.1(a)(3) PP49-51.) This review authorized payment of a $ 5,704 bonus, which included a $ 1,000 Heinz Special Extra Bonus. (Pl.'s LR 56.1(b)(3)(B) P87.) n3

Elisa Loconte, the manager of Quality Assurance, experienced difficulties working with the Heinz team on the SmartOnes Pizza line. (*Id.* P89.) In mid-February 2001, Heinz informed Little Lady Foods that it would no longer work with Loconte and the company subsequently fired her. (*Id.*) John Geocaris then transferred management of the Quality Assurance department to Kevin O'Rourke, and Little Lady Foods hired Mohammed Allaudin as a consultant for the department. (*Id.* P90.) During this time, Johal continued to work on the SmartOnes Pizza team. (*Id.* P91.)

The acquisition of the Heinz SmartOnes Pizza account prompted Little Lady Foods to consider further reorganizing its Technical Services department to meet the more complex technical needs of sophisticated customers such as Heinz, as well as the increased technical requirements of the United States Department of Agriculture ("USDA"). (Def.'s LR 56.1(a)(3) PP79, 80, 83.) Based on complaints it received from Heinz, Little Lady Foods decided to hire a person with the technical expertise necessary to supervise both the

Quality Assurance and Research and Development departments. (*Id.* P81.) John and Daniel Geocaris discussed creating a new position to oversee the two departments at the beginning of 2001. (*Id.* P84.) The reorganization of the Quality Assurance and Research and Development departments was also discussed at management meetings held while Little Lady Foods was in the midst of preparing the SmartOnes line for production. (*Id.* P85.) These discussions focused on what Little Lady Foods needed to do to meet the expectations of more demanding and technically advanced customers. (*Id.* P86.) In mid-February 2001, Johal was removed from the Executive Planning Committee and, after that time, was not privy to discussions about the company's strategic planning. (Pl.'s LR 56.1(b)(3)(B) P96.)

In April 2001, John Geocaris told Johal that the company had hired Paula Gerlat as the Director of Technical Services. (*Id.* P99.) Geocaris provided Johal with a copy of the job description for the Director of Technical Services and a copy of Gerlat's resume. (*Id.*) He told Johal that she would report to Gerlat as soon as Gerlat began work with Little Lady Foods. (*Id.*) Gerlat started work with the company on May 15, 2001. (*Id.* P102.) On May 25, 2001, Johal sent a memo to Daniel Geocaris asking him to clarify her job duties pursuant to the hiring of a Director of Technical Services. (*Id.* P105.) At about this time, John Geocaris began to receive complaints that Johal refused to acknowledge Gerlat as her supervisor and did not speak to her. (*Id.* P103.) John Geocaris also received complaints from internal sales representatives regarding Johal's unrealistic representations to customers. (*Id.* P104.) n4

Gerlat's first responsibility during the initial six weeks of her employment was to resolve problems that Little Lady Foods had with the USDA, problems that had resulted in a week-long shut down in the pizza plant for meat production. (*Id.* PP103-04.) This shut down resulted from documentation failures that occurred during Loconte's tenure as Manager of

Quality Assurance. (*Id.* P103.) During this period, Johal continued to work on ongoing research and development projects. (*Id.* P107.) The company's sales staff and customers contacted Johal directly about these projects. (*Id.* P108.)

After Gerlat was hired, Little Lady Foods began to focus on reorganizing the Research and Development department. (Def.'s LR 56.1(a)(3) P89.) The company determined that it needed to create a position in the department requiring formal culinary training so that it could meet the needs of its more sophisticated customers and continue to grow. (*Id.* P90.) At the time it acquired the Heinz account, Little Lady Foods neither had a corporate chef nor employed anyone with a culinary degree, and therefore had to outsource most of its culinary work to other companies. (*Id.* P91.)

In July 2001, Little Lady Foods decided to eliminate the position of Manager of Research and Development. (*Id.* P92.) The company's stated reasons for the elimination of the position included the increased sophistication of the company's customers, the increased technical requirements of the USDA, and the need for greater culinary skill. (*Id.* P93.) n5 John Geocaris anticipated that the head of Research and Development would need to have formal culinary training to interact with customers with more complicated needs, such as Heinz. (*Id.* P94.) Moreover, this person would no longer be as responsible for the technical aspects of the job but would focus instead on product and sample development. (*Id.* PP95, 97.) To accomplish these goals, the company determined that it needed to have a corporate chef manage the Research and Development department. (*Id.* P98.) The more technical aspects of the job would become the responsibility of the Director of Technical Services. (*Id.* P96.) Thus, the former responsibilities of the Research and Development manager would be redistributed among the newly created position of Corporate Chef, the Director of Technical Services, and the Lead Research ~~and~~ Development Technician. (*Id.* P99.) The Research and Development portion of the job description for

Director of Technical Services was nearly identical to that of Manager of Research and Development. (Pl.'s LR 56.1(b)(3)(B) P165.)

John Geocaris decided to discharge Johal in July 2001 based on her job performance, the reorganization of the Research and Development department, and the elimination of her current position. (Def.'s LR 56.1(a)(3) P110.) On July 13, 2001, he informed Johal that her employment with Little Lady Foods was being terminated. (Pl.'s LR 56.1(b)(3)(B) P109.) Geocaris offered Johal a severance package with a total value of $ 42,144.65, which included six months of severance pay, but Johal turned it down. (Def.'s Ex. B, Johal Dep. at 257-58.) n6 Upon termination, Johal received payment for accrued vacation, bonuses through July 2001, and the value of 6,667 of the 10,000 stock appreciation rights (SARs) she received from the company. (Pl.'s LR 56.1(b)(3)(B) PP111-12.) Johal had received the SARs effective January 1, 1999. (*Id.* P112.) They vested as follows: 3,333 on December 31, 1999; 3,334 on December 31, 2000; and 3,333 December 31, 2001. (*Id.*.) At the time she was discharged, her 6,667 vested SARs were automatically exercised; the 3,333 unvested SARs were forfeited. (*Id.* P113.) John Geocaris set the value on the SARs. (*Id.* P111.)

Little Lady Foods established its Stock Appreciation Rights Plan on March 1, 1993. (*Id.* P126.) At that time, the company awarded 50,000 SARs apiece to Roger Williams, the Vice President of Finance; Robert Gannett, the Vice President of Operations; Daniel Geocaris, the Vice President for Sales and Marketing; Michael Eisel, the Plant Manager; and Richard Madsen. n7 (*Id.* PP127-32.) All of these men are Caucasian. (*Id.* PP128-32.) On February 13, 1996, Little Lady Foods awarded 25,000 SARs apiece to Roxanne Orman, the company's comptroller; Larry Linnet, the Sales Manager; Peter Cokinos, the Director of Sales; and George Cohn, the Purchasing Manager. (*Id.* PP134-37.) Each of these awards was subject to an addendum that limited the value of

the SARs. (*Id.* P134.) Orman, Linnett, and Cokinos are Caucasian; Cohn is African-American. (*Id.* PP135-37.)

On January 1, 1999, the company awarded 10,000 SARs each to Johal; Orman; Madeline Gonzalez, the Plant Manager; James Burnett, the Warehouse Manager; and Carlos Pineiro, the Sanitation Manager. (*Id.* PP139-46.) Another 75,000 SARs were awarded to Daniel Geocaris. (*Id.* P139.) Burnett is African-American; Gonzalez and Pineiro are Hispanic. (*Id.* PP142, 144, 146.) Sometime in 2000, Little Lady Foods awarded 150,000 SARs each to Kevin O'Rourke, the Vice President of Operations, and Thomas Scott, the Vice President of Administration. (*Id.* PP148-50.) Both men are Caucasian. (*Id.* PP149-50.)

The Stock Appreciation Rights Plan provided a formula to determine the fair market value of the SARs, and allowed for appeal if the employee did not agree with that valuation. (*Id.* P153.) However, under the 1996 addendum, the employee was bound by the valuation of the stock and could not appeal. (*Id.* P154.) The Plan provided for payout in three installments, whereas the addendum permitted payment in one lump sum. (*Id.* PP155-56.) The Plan provided that an employee who died or was terminated employment forfeited all SARs if the employee was not at least fifty percent vested. (*Id.* P157.) The addendum permitted the employee to receive all vested SARs on death or termination. (*Id.* P158.) Moreover, the Plan provided that if the company terminated an employee for reason other than cause, the employee would be one hundred percent vested. (*Id.* P159.) The addendum, on the other hand, provided that on termination, the employee was entitled to only the vested interest. (*Id.* P160.) The Plan was therefore more valuable to the employee because it granted a right to appeal the SARs' valuation and because it provided one hundred percent vesting if an employee was terminated for reason other than cause. (*Id.* P161.)

After Johal was discharged, the responsibilities of the Manager of Research and Development were split between Paula Gerlat, the Director of Technical Services, and Elizabeth Valezquez, the lead Research and Development technician. (Def.'s LR 56.1(a)(3) P119.) In the third or fourth quarter of 2001, Little Lady Foods hired Nikol Bava as its Corporate Chef. (*Id.* P120.) Bava also supervised the Research and Development technicians. (*Id.* P120.) Bava received an A.A.S. degree in Culinary Arts from Joliet Junior College in 2001 and prior to 1999, she worked outside the food industry. (Pl.'s LR 56.1(b)(3)(B) PP9-10.) In early 2000, Bava was replaced by Sue Ashton Becker. (Def.'s LR 56.1(a)(3) P121.) Becker was over the age of forty. (*Id.* P122.) In March 2002, Little Lady Foods eliminated the Director of Technical Services position, and hired Eric Johannsen as Vice President of Technical Services. (*Id.* P124.) Johannsen was also over forty years old. (*Id.* P125.) The statements of fact are devoid of the following information: (1) the race, color, national origin, or age of Gerlat, Valezquez, or Bava; (2) the race, color, or national origin of Becker or Johannsen.

Johal's reliance on her testimony regarding statements made to her by other employees that they heard Kevin O'Rourke make several comments about Asians and workers under Robert Gannett, who happened to be African-American and Hispanic, is inadmissible hearsay. It is undisputed that O'Rourke was not involved in the decision to discharge Johal or eliminate the Manager of Research and Development position. (*Id.* PP115-16.) At management meetings, he did participate in discussions about reorganizing the Quality Assurance and Research and Development departments. (*Id.* P117.) These discussions focused not on specific jobs or individuals, but on what needed to be done to take Little Lady Foods from a $ 25 million dollar company to a $ 45 million dollar one, as this is what had occurred within a year

of Little Lady Foods' acquiring the Heinz account. (*Id.* P118.) n8

In May 2002, Johal filed a charge with the Equal Opportunity Employment Commission ("EEOC") alleging discrimination based on race, color, national origin, sex, religion, and age. (*Id.* P141.) On November 21, 2002, Johal filed her Complaint alleging race, national origin, color, sex, and religious discrimination. On June 11, 2003, she filed an amended Complaint alleging race, color, national origin, age and sex discrimination. (*Id.* P147.)

DISCUSSION

I. Motions to Strike

First, Defendant moves to strike paragraphs 13-14 and 35-45 from the Plaintiff's Statement of Additional Facts on the grounds that the exhibits contained in the Plaintiff's Appendix of Exhibits, specifically Exhibit C, do not represent admissible evidence. Defendant relies on this Court's previous ruling at a hearing on July 8, 2003 that Defendant was required to provide Plaintiff with the names of Little Lady Foods' officers and directors. (Hr'g Tr. of 7/8/2003 at 12-14.) Defendant claims Plaintiff has attempted to circumvent this Court's order by also obtaining the minutes of shareholder meetings through a request as a shareholder. Upon review of the hearing transcript, the Court notes that although the parties raised the issue whether the minutes of shareholder meetings were subject to discovery, the issue was not discussed substantively. Further, the motion to strike does not sufficiently address paragraphs 44 and 45 that do not rely on Exhibit C and instead rely on Exhibit B. Accordingly, the Court denies Defendant's motion to strike paragraphs 13-14 and 35-45 of Plaintiff's LR 56.1(b)(3)(B) Statement.

Second, Defendant moves to strike, for failure to comply with Local Rule 56.1(b)(3)(A), several paragraphs from Plaintiff's Response to Defendant's *Local Rule 56.1*

Statement of Facts. Local Rule 56.1(b)(3)(A) requires that a response to a motion for summary judgment contain "a response to each numbered paragraph in the moving party's statement, including, in the case of disagreement, specific references to the affidavits, part of the record, and other supporting materials relied upon." The Seventh Circuit has stated numerous times that "district courts are not obliged in our adversary system to scour the record looking for factual disputes." *Waldridge v. Am. Hoechst Corp., 24 F.3d 918, 922 (7th Cir. 1994)*. When the non-moving party fails to adhere to the local rules that require a response to the moving party's statement of facts, supported by appropriate citations to the record, the moving party's facts remain uncontested. *World Impressions, Inc. v. McDonald's Corp., 235 F. Supp. 2d 831, 834 (N.D. Ill. 2002)*. The district court may strike those responses by the nonmovant that do not comply with the local rule. *Id.* After reviewing Plaintiff's responses to Defendant's statement of undisputed facts, the Court agrees with Defendant that the following paragraphs of Plaintiff's response do not comply with Local Rule 56.1(b)(3)(A), as these responses deny the asserted facts but fail to support the denials with specific and accurate references to the record, affidavit, or other supporting material: 40-43, 63, 70, 73, 75-78, 87, 90-94, 98, 100, 102-04, 110, 127, 129, and 131-32. These responses are stricken, and the facts Defendant asserted in those paragraphs are deemed admitted. Moreover, Plaintiff did not respond at all to paragraphs 88 and 89, therefore both paragraphs are also deemed admitted.

Third. Defendant moves to strike several paragraphs in Plaintiff's Statement of Additional Facts because they are argumentative, non-responsive, or legal conclusions. Other paragraphs allegedly lack evidentiary support in the form of citations to the record. Local Rule 56.1(b)(3)(B) requires the nonmovant to set forth, in short numbered paragraphs, facts that require the denial of summary judgment and to support these facts by specific references to the record. LR

56.1(b)(3)(B); *see Malec v. Sanford, 191 F.R.D. 581, 584 (N.D. Ill. 2000)*. The following paragraphs in the Plaintiff's Statement of Additional Facts lack any citation to the record and are therefore stricken: 12, 133, 138, 140, 147, 163, and 164. As for the remaining paragraphs Defendant asks to have stricken, the Court is fully capable of examining the parties' factual statements to determine which facts should be considered and which should not. *See Ogborn v. United Food & Commercial Workers, Local No. 881, 2000 U.S. Dist. LEXIS 14092, No. 98 C 4623, 2000 WL 1409855, at *3 (N.D. Ill. Sept. 25, 2000)* ("To the extent any factual assertion has been inadequately or improperly supported, such assertions will not be incorporated into the facts taken to be true for purposes of [summary judgment] . . . .").

Fourth, Defendant moves to strike paragraphs 27-28 and 31 from Plaintiff's Exhibit D, the affidavit of Robert Gannett, the former Vice President of Operations for Little Lady Foods. Defendant argues that these paragraphs are irrelevant. The Court disagrees and finds them remotely relevant to the issue of pretext. In the alternative, Defendant has responded to each individual paragraph that cites to Gannett's affidavit, and such responses will be considered in the usual course.

Defendant also moves to strike Sub-exhibit A, submitted with Gannett's affidavit, and the portion of paragraph 32 of Gannett's affidavit that quotes Sub-exhibit A for failure to lay the appropriate foundation of a business record pursuant to *Federal Rule of Evidence 803(6)*. In order to be "admissible as business records under *Fed. R. Evid. 803(6)* . . . a proper foundation [must be laid] as to the reliability of the records." *Collins v. D.J. Kibort, 143 F.3d 331, 337 (7th Cir. 1998)*. "A proper foundation is established if the party attempting to admit the evidence demonstrates that the business records 'are kept in the course of regularly conducted business activity, and [that it] was the regular practice of that business activity to make records, as shown by the testimony of the custodian or otherwise qualified witness.'" *Id.* (quoting

United States v. Briscoe, 896 F.2d 1476, 1494 (7th Cir. 1990)) (internal quotations omitted). Plaintiff's Sub-Exhibit A is a memorandum dated April 10, 2000 and sent by John Geocaris to all employees of Little Lady Foods' employees that describes changes in the company's management structure. (Pl.'s Ex. C, Sub-ex. A, P32.) Plaintiff has made no effort to demonstrate that the memorandum is admissible under the business records exception or any other exception to the hearsay rule. Given that Plaintiff has failed to establish the proper foundation, the Court grants Defendant's motion to strike Sub-exhibit A and that portion of paragraph 32 that quotes Sub-exhibit A.

Finally, Defendant moves to strike additional facts Plaintiff presented solely in her brief in response to its Motion for Summary Judgment because Plaintiff failed to cite to any part of the record. The submissions pursuant to the Local Rule regarding summary judgment provide the only acceptable means of disputing the other party's facts and presenting additional facts to the district court. *See World Impressions, 235 F. Supp. 2d at 835.* It is not sufficient to provide the Court with additional facts in one's responsive memorandum. *Malec, 191 F.R.D. at 584.* The Seventh Circuit has "consistently and repeatedly required strict compliance" with the Local Rule regarding summary judgment. *Id.* (citing *Midwest Imports, Ltd. v. Coval, 71 F.3d 1311, 1316-17 (7th Cir. 1995)).* Therefore, the Court will not consider any additional facts presented in the Plaintiff's brief that were not originally presented in her LR 56.1(b)(3)(A) or LR 56.1(b)(3)(B) Statement.

II. Motion for Summary Judgment

Pursuant to *Federal Rule of Civil Procedure 56(c)*, the Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. When considering evidence submitted by the parties, the court does not weigh it or determine the truth of asserted matters. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. All facts must be viewed and reasonable inferences drawn in the light most favorable to the non-moving party. *NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 234 (7th Cir. 1995)*. "If no reasonable jury could find for the party opposing the motion, it must be granted." *Hedberg v. Ind. Bell Tel. Co., Inc. 47 F.3d 928, 931 (7th Cir. 1995)*.

Defendant moves for summary judgment because Plaintiff has failed to create a genuine issue as to a material fact regarding her age, color, national origin, race, and sex discrimination claims. Title VII prohibits employers from discriminating against an employee based on race, color, religion, sex, or national origin. n9 *42 U.S.C. § 2000e-2(a)(1)*. Likewise, the ADEA makes it unlawful "to fail to or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." *29 U.S.C. § 623(a)(1)*. The burden is on the plaintiff to prove intentional discrimination by a preponderance of the evidence. *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993)*. Plaintiffs can make out their discrimination claims through either the direct or indirect method. *Huff v. UARCO Inc., 122 F.3d 374, 380 (7th Cir. 1997)*. Under the direct method, the plaintiff must show that the defendant or its agents acknowledge discriminatory intent or that circumstantial evidence permits an inference of discrimination on the employer's part. *Id.* The Seventh Circuit Court of Appeals has distinguished three types of circumstantial evidence from which such inferences can be drawn. *Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994)*. "The first consists of suspicious timing, ambiguous statements oral or written, behavior toward or

comments directed at other employees in the protected group," and other similar types of evidence from which the court could draw a reasonable inference of discriminatory animus. *Id.* The second is evidence that employees who were similarly situated to the plaintiff but not members of the protected class received systematically better treatment. *Id.* Finally, the third is evidence that the plaintiff was qualified for the job but was replaced by someone outside the protected class, and that the employer's reason for the treatment is mere pretext for discrimination. *Id.*

Plaintiffs may also satisfy their burden of proof by using the indirect, burden-shifting method set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)*. Under this approach, Johal must first establish a *prima facie* case of discrimination by the proving that (1) she is a member of a protected class; (2) she was performing her job satisfactorily; (3) she was subject to a materially adverse employment action; and (4) other employees who were similarly situated but outside of the protected class were treated more favorably. *See id. at 802*; *St. Mary's, 509 U.S. at 506.*

Given that both parties agree that the events leading to Johal's discharge are consistent with the mini-reduction in force ("mini-RIF") situation described in *Michas v. Health Cost Controls of Illinois, Inc., 209 F.3d 687 (7th Cir. 2000)*, the typical fourth prong of *McDonnell Douglas* test does not apply here. Instead, Johal must show that her job duties were absorbed by employees who were not members of her protected class. *Id. at 693*. Should Johal establish a successful *prima facie* case, the burden of production then shifts to Little Lady Foods to show a legitimate, non-discriminatory reason for its actions. *Id.* If Little Lady Foods can establish a legitimate, non-discriminatory reason, the burden then shifts back to Johal to show that Little Lady Foods' stated reason is pretextual. *Id.* However, the ultimate burden of proving

intentional discrimination rests at all times with the plaintiff. *Id.*

A. Direct Method

Johal attempts to show through circumstantial evidence that Little Lady Foods intentionally discriminated against her on the basis of race, color, national origin, and sex. The main elements of her argument are as follows: (1) John Geocaris, the president of Little Lady Foods, deliberately avoided supervising employees who were members of minority groups; (2) her work was satisfactory and that she had acted as *de facto* manager of the Department of Technical Services prior to that position being created; (3) a statistical analysis of minority employees who held positions of manager and above at Little Lady Foods shows the number of minority employees dropped dramatically after April 2000; (4) rewards of SARs under the company's Stock Appreciation Rights Plan went disproportionately to Caucasian employees; and (5) inconsistencies in the testimony of John Geocaris call into question his credibility in a manner that can only be resolved by a jury.

In her memorandum in opposition to the motion for summary judgment, Johal asserts that John Geocaris consciously avoided having an employee who was a member of a minority group report to him. n10 She cites to the undisputed facts that, during her first several years at Little Lady Foods, when she filled the position of Manager of Quality Assurance, the three individuals to lead research and development were female Caucasians in their late twenties or early thirties, and that each of these women reported to John Geocaris. (*See* Pl.'s LR 56.1(b)(3)(B) PP50, 51, 53.) However, during the periods between 1992 and 1998, when the company did not have a leader of research and development, Johal took on that position in addition to managing the Quality Assurance department and worked with Geocaris although she did not report to him directly. (*Id.*

PP50, 52, 54.) Johal also notes that Geocaris turned supervision of the Quality Assurance department over to Kevin O'Rourke after Elisa Loconte, a Caucasian, was fired in February 2001, at which point O'Rourke hired an Asian-American consultant, Mohammed Allaudin to head the department. (*Id.* P90.) Taken together, these few facts do not create a reasonable inference that John Geocaris consciously or systematically discriminated against minority employees. Johal fails to provide any evidence that Geocaris' decision not to supervise the Research and Development department had anything to do with the race of the person heading it. As such, Johal's contention is speculative at best and cannot withstand summary judgment.

Johal further asserts that she acted as the *de facto* manager of Technical Services during the periods between August 1992 and April 2000 when she performed the duties of both the manager of Quality Assurance and head of Research and Development. She cites to her own assessment of her performance and the positive reviews she received from Robert Gannett to imply that she was meeting her employer's legitimate expectations when they terminated her. (Pl.'s LR 56.1(b)(3)(B) P54.) The Seventh Circuit has consistently ruled that an employee's self-interested assessment of her own work performance is insufficient to establish circumstantial evidence of discrimination. *See, e.g., Mills v. First Fed. Sav. & Loan Ass'n of Belvidere, 83 F.3d 833, 843 (7th Cir. 1996)*; *Gustovich v. AT & T Communications, Inc., 972 F.2d 845, 848 (7th Cir. 1992)* ("An employee's self-serving statements about his ability . . . are insufficient to contradict an employer's negative assessment of that ability."); *Williams v. Williams Elecs., Inc., 856 F.2d 920, 924 (7th Cir. 1988)* (employee's self-interested assessment of her own job abilities is insufficient to raise an issue of fact for trial).

Likewise, Gannett's assessment of Johal's performance is not probative of her performance at the time of her discharge

because he left the company in April 2000, more than a year before Johal was terminated. The case law does not lend much support for statements by former supervisors that generally corroborate a plaintiff's own perception of her abilities. *See, e.g., Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124-25 (7th Cir. 1994)* (affidavit of former supervisor that plaintiff's performance was satisfactory and that admitted mishaps were not entirely his fault insufficient to defeat summary judgment); *Williams, 856 F.2d at 924* (former supervisor's general statements about plaintiff's abilities did not establish that employer had not genuinely considered plaintiff's performance in making its layoff decision). In sum, Johal's own and Gannett's assessments of her abilities do not create a genuine issue as to a material fact regarding whether she was meeting Little Lady Foods' legitimate expectations at the time of her termination.

Johal next asserts that statistical evidence regarding a decrease in the number of minority managers at Little Lady Foods provides circumstantial evidence of discrimination. She states that on April 10, 2000, five of the six managers who reported to Robert Gannett, Vice President of Operations, were non-Caucasian. (Pl.'s LR 56.1(b)(3)(B) P61.) She states that as of July 30, 2003, Defendant employed a total of six managers, two of whom were Hispanic and four of whom were Caucasian. (*Id.* P44.) Even reading all disputed facts in her favor, as the Court must, this incomplete statistical data, however, is insufficient to survive summary judgment. To show disparate treatment between comparable individuals, Johal would not only need to include information about the national origin, color, age, and gender of the individuals involved in the personnel changes, but also the relative qualifications of such individuals. *See, e.g., Swanson v. Leggett & Platt, Inc. 154 F.3d 730, 734 (7th Cir. 1998)* (data not considered probative because it does not contain the qualifications of the individuals retained, hired, or demoted); *Fisher v. Wayne Dalton Corp., 139 F.3d 1137,*

1140-41 (7th Cir. 1998) (statistical evidence not probative because it failed to rule out potential explanatory variables). Without information about the employees' relative qualifications, it is impossible to infer discriminatory intent from the data Johal provides. *See Vanasco v. National-Louis Univ., 137 F.3d 962, 967 (7th Cir. 1998)*(chart showing ages of instructors granted and denied tenure not probative because it showed instructors' ages but not their relative qualifications and, therefore plaintiff did not provide enough information from which to infer age bias).

Next, Johal argues that the manner in which the company distributed SARs provides circumstantial evidence of discriminatory intent. She notes that in 1993 and 2000, when the awards went only to Caucasians, they did not include addenda; whereas, in 1996 and 1999, when SARs went to minority as well as Caucasian recipients, they included addenda that reduced their value. (Pl.'s LR 56.1(b)(3)(B) PP126-32, 134-37, 139, 141-46, 148-61.) However, as Johal herself points out, in 1993 and 2000, Little Lady Foods awarded SARs primarily to its officers, while in 1996 and 1999, the awards went primarily to managers and directors, who were at a lower level in the corporate hierarchy. (Pl.'s Br. at 8.) Again, the evidence Johal provides here is incomplete and, in the absence of any comparison of the qualifications of those employees awarded SARs or the rationale behind the addenda, it is insufficient to create a reasonable inference of discrimination.

Finally, Johal points to inconsistencies between John Geocaris' testimony and corporate documents, arguing that they create a question of credibility that should be resolved by a jury. First, Johal takes issue with the fact that John Geocaris testified that he discussed her discharge with Dan Geocaris and Ruth Gilman, then Vice President of Human Relations. She suggests that, given that Paula Gerlat was Director of the Technical Services Department, Gerlat also should have participated in the decision. Johal further

speculates that because she was removed from the management committee in February 2001, because the job description of the Director of Technical Services included most of the duties of the Manager of Quality Assurance, and because Geocaris failed to consult with Gerlat regarding Johal's termination, he probably made his decision to discharge her in February 2001, rather than the June-July 2001 date to which he testified in his deposition. (Pl.'s LR 56.1(b)(3)(B) P165.) Again, she offers no evidence to support this speculative argument. n11 Such facts, even if the Court assumes they are true for purposes of the instant motion, are irrelevant, as Johal does not dispute that John Geocaris, as president of Little Lady Foods, had the authority to modify a position's requirements or eliminate it completely to accommodate the company's changing needs. (*See* Def.'s LR 56.1 PP95-96, 99-100.) Thus, the alleged timing of the decision to terminate Johal and the individuals with whom he chose to consult are immaterial and do not create an issue of material fact.

Second, Johal contends that John Geocaris incorrectly stated as two the number of elected officers the company had between 1995 and 2002. (Pl.'s App., Ex. F, Dep. of John Geocaris, 33.) The company actually elected four officers annually since 1995 and eight in 2002. (Pl.'s LR 56.1(b)(3)(B) PP35-43.) Johal states that this inconsistency is material to showing that she was victim of a glass ceiling effect at Little Lady Foods. We disagree, this inconsistency is immaterial as it does not speak to the issue of the case: whether Geocaris harbored a discriminatory intent in deciding to eliminate Johal's position. On the issue of the reorganization of the Research and Development department, Geocaris has not offered contradictory testimony between the time Johal was discharged and the time of his deposition. As such, this does not create an issue of material fact. *See Stalter v. Wal-Mart Stores, Inc. 195 F.3d 285, 291 (7th Cir. 1999)* (a question of fact exists where employer's story undergoes

fundamental change between time it undertook adverse employment action and time of administrative proceeding); *Emmel v. Coca-Cola Bottling Co. of Chicago, 95 F.3d 627, 634 (7th Cir. 1996)* (failure to express non-discriminatory explanation earlier despite several opportunities to do so gives rise to inference that later expressed reason is pretextual); *Perfetti v. First Nat'l Bank of Chicago, 950 F.2d 449, 456 (7th Cir. 1991), cert. denied, 505 U.S. 1205, 120 L. Ed. 2d 871, 112 S. Ct. 2995, (1992)* (when employer gives one reason at time of the adverse employment decision and at trial gives another reason unsupported by documentary evidence, jury could reasonably conclude that new reason was pretextual after-the-fact justification).

Finally, Johal contends that Geocaris testified at his deposition that the addenda to the company's SARs certificates applied to everyone and not just the employees who were awarded SARs in 1996 and 1999. (Pl.'s App. Ex. F, Dep. of John Geocaris, 73.) Johal asserts in her memorandum in opposition to the summary judgment motion that the SARs awarded on December 15, 2001 to Kevin O'Rourke and Thomas Scott, both Caucasian men, were granted without the addendum limiting their value. However, Johal in her brief fails to provide a citation to the record to support this assertion and fails to state this proposed fact (and thus did not cite the record in support) in either her LR 56.1(b)(3)(A) Statement or her LR 56.1(b)(3)(B) Statement. She also does not provide any additional information about their rank within the company or their qualifications that might support her claim that the awards to O'Rourke and Scott are evidence of impermissible discriminatory treatment under the SARs plan. As a result, she fails to create an issue as to a material fact regarding this purported inconsistency.

In sum, Johal argues that John Geocaris' alleged pattern of avoiding direct supervision of non-Caucasians, statistical data showing a sudden drop in the number of minorities holding positions of manager or above after April 2000, the

different treatment of Caucasian and minority employees in the granting of SARs, and the conflicting testimony of Geocaris constitute circumstantial evidence from which a reasonable person could infer discriminatory intent. However, for the reasons discussed, even taken together, this evidence is insufficient to establish a triable issue of fact regarding whether her termination was based on an illegal discriminatory animus.

B. Indirect Method

To establish a *prima facie* case of discrimination in a mini-RIF situation, Johal must show that: (1) she is a member of a protected class; (2) she was performing the functions of her job satisfactorily; (3) she experienced a materially adverse employment action; and (4) her duties were absorbed by employees who were not members of the protected class. *Michas, 209 F.3d at 693.* Little Lady Foods concedes that Johal meets the first and third prongs of the test. As a woman born in India over the age of forty, Johal falls into several protected classes: sex, age, national origin, and color. Clearly, Johal's termination qualifies as a materially adverse employment action. Accordingly, the Court focuses on whether Johal's evidence has created a triable issue of material fact regarding the second and fourth prongs, *i.e.*, whether she was performing her job satisfactorily and whether her duties were substantially absorbed by individuals outside of the protected classes into which she falls.

Johal contends that the evidence shows she was satisfactorily performing her job in 2001. A written performance review dated January 28, 2001 indicated she had done a nice job with several accounts, including Heinz. (Pl.'s LR 56.1(b)(3)(B) P88.) The review authorized both a bonus of $ 4,704 and a $ 1,000 Extra Special Bonus for her work with the Heinz account. (*Id.* P87.) Moreover, Johal indicates that she received a $ 1,400 per annum raise as of January 1, 2001 and an additional $ 1,000 raise on April 1, 2001. (*Id.*

P97.) In her memorandum in opposition to the summary judgment motion, Johal further argues that John Geocaris made no reference to her performance at her exit interview and that the company paid her a bonus for the first six months of 2001. (Pl.'s Br. at 11.) However, she fails to cite to the record to support these two assertions and failed to provide such statements of fact in her either her LR 56.1(b)(3)(A) Statement or LR 56.1(b)(3)(B) Statement. (*Id.*) Finally, Johal notes that her personnel file contained no adverse information, but she likewise fails to offer any evidence for this assertion. (*Id.*)

Little Lady Foods maintains that Johal's performance was less than satisfactory and points to several negative comments in her performance review that indicate she needed to improve her technical knowledge, show more creativity with recipes, and develop better rapport with all managers. (Def.'s LR 56.1(a)(3) PP49-51.) Little Lady Foods also claims that it froze Johal's salary for the first three months of 2001 until she improved her performance in deficient areas. (*Id.* P52.) Yet, Johal's pay stubs for the period appear to indicate that she received two pay increases. The record does not indicate why her pay increased during this period. Her pay record dated December 12, 2000 shows a regular pay rate of $ 2,023.08 or $ 52,600 per year; the record dated January 26, 2001 shows a regular pay rate of $ 2,076.98 or approximately $ 54,000 per year, a 2.6 percent increase; and, the record dated April 20, 2001 shows a regular pay rate of $ 2,115.38 or approximately $ 55,000 per year, a 1.8 percent increase. (Pl.'s App., Ex. A, Aff. of Robin Johal, Sub-ex. 2-4.) n12 Neither party presents any evidence as to whether these pay raises were above or below average for employees at Johal's level.

The receipt of bonuses and pay increases do not necessarily indicate that Johal was performing up to Little Lady Foods' expectations at the time of her termination in July 2001. What matters in a discriminatory discharge case is

not the employee's past performance, but whether she was meeting the company's expectations at the time of her discharge. *See Cengr v. Fusibond Piping Sys., Inc., 135 F.3d 445, 452-53 (7th Cir. 1998)*; *Karazanos v. Navistar Int'l Transp. Corp., 948 F.2d 332, 336 (7th Cir. 1991)* (the court must focus on plaintiff's performance at the time of his termination because "the fact that an individual may have been qualified in the past does not mean he is qualified at a later time."). The bonuses authorized in Johal's January 2001 performance review were for work she performed during the year 2000. Similarly, she apparently received pay increases in January and April of 2001, several months before she was terminated in July 2001. These increases are therefore not determinative of Johal's performance at the time she was discharged and, as such, do not by themselves raise a genuine issue of material fact.

Little Lady Foods cites as further evidence of Johal's unsatisfactory performance complaints it received from customers, including Heinz, regarding Johal's inability to adequately perform tasks associated with her position fulfilling the research and development and quality assurance function. (Def.'s LR 56.1 PP73, 75-77.) Johal admits that Kevin O'Rourke, John Geocaris, Peter Cokinos, and Michael Eisel testified that they received such complaints, but she disputes their accuracy. However, she fails to cite to any portion of the record to dispute the accuracy of the complaints. Accordingly, these statements are deemed admitted. In particular, a representative from Heinz complained that Johal could not follow directions and that she failed to proof her work, which resulted in errors. (*Id.* PP76-77.) Little Lady Foods states that as the company grew and took on more sophisticated customers, Johal's lack of technical proficiency became increasingly significant. (*Id.* P87.) n13

Finally, Little Lady Foods argues that Johal resisted the organizational changes the company made prior to her

termination, a fact Johal admits. (Def.'s LR 56.1 PP53-56.) Johal further admits that she told Mike Eisel she did not believe Gerlat was qualified to be Director of Technical Services and that she should have gotten the job. (*Id.* P56.) Johal was upset that the company was merging the departments again and that she would not be in charge. (*Id.* P58.) Little Lady Foods contends that Johal refused to acknowledge that Gerlat was her supervisor and that she needed to communicate with Gerlat. (*Id.* P61.) Both Dan Geocaris and Mike Eisel have testified that they warned Johal she was jeopardizing her job with the company by refusing to speak with Gerlat. (*Id.* PP62-63.) Johal denies receiving warnings from either man but cites only to their testimony in making her denial. She claims that for the first six months of Gerlat's employment, Gerlat spent eighty percent of her time resolving Little Lady Foods' problems with the USDA, presumably limiting the time she had available to meet with Johal. (Pl.'s LR 56.1(b)(3)(B) P104.) This does not raise a genuine issue of material fact regarding whether Johal's refusal to speak to Gerlat was one of the reasons why Defendant found she was not satisfactorily meeting its legitimate expectations.

Johal's assessment of her own performance is likewise insufficient to raise a genuine issue of material fact. *See Mills v. First Fed. Sav. & Loan Ass'n of Belvidere, 83 F.3d 833, 843 (7th Cir. 1996).* Moreover, job performance evaluations cannot, in and of themselves, show adequacy of performance at the time when the adverse employment action was taken. *Fortier v. Ameritech Mobile Communications, Inc., 161 F.3d 1106, 1113 (7th Cir. 1998).* Such evaluations, standing alone, do not create a genuine issue of triable fact when there have been "substantial alterations in the employee's responsibilities and supervision in the intervening period." *Id.* With the creation of the Technical Services Department and the hiring of Paula Gerlat as its director, both Johal's job duties and her supervision changed significantly in the six month period

between her review and her termination. Moreover, even by her own admission, Johal's review was not entirely positive; rather Dan Geocaris pointed out several areas where her performance required improvement. Johal does not dispute that there were complaints about her performance from Heinz or that she resisted the organizational changes occurring at the company; changes which management had determined were essential in order to adjust to their new, important and more sophisticated client. Finally, although the evidence indicates that Johal received two pay increases in the first six months of 2001, these increases do not show that Johal was performing to the company's satisfaction at the time of her discharge. Because Johal fails to raise any genuine issues of material fact as to whether she was performing her job to the company's satisfaction, the Court grants Defendant's motion for summary judgment as to this prong of the test.

Johal and Little Lady Foods also disagree as to whether Johal meets the fourth prong of the test laid out in *Michas* for mini-RIF situations, *i.e.*, whether her duties were substantially absorbed by employees who were not members of her protected class. *Michas, 209 F.3d at 693-94.* As Johal is alleging that Little Lady Foods discriminated against her on the basis of sex, age, national origin, and color, each of these classes will be addressed in turn.

As to the charge of sex discrimination, Johal's duties as Manager of Research and Development were initially absorbed in part by the Director of Technical Services position, which was held by a woman, Paula Gerlat. Her other duties were absorbed into the Corporate Chef position initially occupied by Nikol Bava and then by Sue Ashton Becker, both women. Finally, the remainder of Johal's duties were absorbed by the lead Research and Development technician, Elizabeth Valezquez, also a woman. Because Johal cannot show that her duties were absorbed by individuals who fall outside the protected class of women, she fails to make a *prima facie* case for sex discrimination.

The Court therefore grants Little Lady Foods' motion for summary judgment as to the sex discrimination claim.

Regarding the charge of age discrimination, Johal, who was fifty years old at the time of her termination, must establish that she would not have been terminated "but for" intentional age-based discrimination. *See Michas, 209 F.3d at 692* (court will find an ADEA violation when plaintiff presents evidence that demonstrates age was determining factor in discharge decision). As such, she must present evidence that her job duties were substantially absorbed by individuals who were significantly younger than herself, although not necessarily outside the protected class of employees over the age of forty. *Richter v. Hook-SupeRx, Inc., 142 F.3d 1024, 1028 (7th Cir. 1998)*. The Court of Appeals for the Seventh Circuit considers a ten-year age difference to be "presumptively substantial." *Hoffmann v. Primedia Special Interest Publ'ns, 217 F.3d 522, 524 (7th Cir. 2000)* (citing *O'Connor v. Consol. Coin Operators Corp., 517 U.S. 308, 313, 134 L. Ed. 2d 433, 116 S. Ct. 1307 (1996)*). Johal puts forth no evidence regarding the ages of the three women who initially absorbed her job duties. However, Sue Ashton Becker, who succeeded Nikol Bava as Corporate Chef is over the age of forty, as is Eric Johannsen who was hired as Vice President of Technical Services when Gerlat left the company. (Def.'s LR 56.1 PP122, 125.) Given that Johal fails to present evidence to show that her duties were absorbed by individuals substantially younger than herself, she likewise fails to make a *prima facie* case for age discrimination. The Court therefore grants Little Lady Foods' motion for summary judgment with respect to Johal's age discrimination claims.

Johal devotes her brief to arguing that her termination resulted from discrimination based on national origin and color. Again, to establish a *prima facie* case of discrimination, she must show that her job duties were absorbed by individuals who fell outside of the protected

classes of national origin or color. *Michas, 209 F.3d at 693.* Although Gerlat, who absorbed some of the duties, is white, Johal offers no evidence as to Gerlat's national origin. Bava is also white, but Johal does not offer any evidence as to her national origin. Finally, Valezquez is Hispanic, so she could potentially fall within the protected categories of national origin and color. Because Johal does not offer sufficient evidence to show that the bulk of her duties job was absorbed by individuals outside her protected category of national origin, the Court grants Little Lady Foods' motion for summary judgment as to this claim. Given that the two women who absorbed the bulk of Johal's job duties are not in a protected color category, Johal has met the fourth prong of the *Michas* test as to her color discrimination claim.

However, even if Johal could establish a *prima facie* case for discrimination based on color (or any of her other claims, for that matter), she must still show that Little Lady Foods' stated reasons for terminating her employment were but a pretext for color discrimination. *St. Mary's, 509 U.S. at 506.* That is, Johal must establish that Little Lady Foods did not honestly believe that it was necessary to reorganize its Research and Development department and subsequently eliminate her position. Unless Johal can show that the Defendant did not honestly believe its reasons for discharging her, she loses "even if the reasons are foolish or trivial or baseless." *Kariotis v. Navistar Int'l Transp. Co., 131 F.3d 672, 676 (7th Cir. 1997)* (citing *McCoy v. WGN Cont'l Broad. Co., 957 F.2d 368, 373 (7th Cir. 1992)* ("The issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons it offers.")). Proving pretext requires Johal to show one of three things: (1) that Little Lady Foods' explanation had no basis in fact; (2) that the company's explanation was not the real reason for her termination; or (3) that the company's articulated reason did not justify her

termination. *See Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc., 254 F.3d 644, 652 (7th Cir. 2001).* Johal must rebut each and every one of Little Lady Foods' reasons for her dismissal by presenting facts that tend to show its reasons are false, thereby either showing or implying that the real reason for her termination is impermissible discrimination. *See Kariotis, 131 F.3d at 677.*

Johal points to Little Lady Foods' various explanations for her termination as evidence of pretext, claiming that the company has offered three reasons for its action: (1) its elimination of the Research and Development Manager position; (2) Johal's inability to work with her supervisor Gerlat; and (3) deficiencies in her technical knowledge and in her dealings with customers. (Pl.'s Br. at 11.) Shifting and inconsistent explanations can provide a basis for finding pretext. *See Stalter v. Wal-Mart Stores, 195 F.3d 285, 291 (7th Cir.1999)* However, to show that Little Lady Foods' explanations for the elimination of her position are pretextual, Johal must first establish that the company's explanations are actually shifting and inconsistent. *Schuster v. Lucent Techs., Inc. 327 F.3d 569, 577 (7th Cir. 2003).*

Johal cites to the deposition testimony of John Geocaris, who stated that he was unaware of whether Johal had been warned about her unsatisfactory performance and then claimed that her deficiencies were not the primary reason for her termination. (Pl.'s App., Ex. F, Dep. of John Geocaris, at 95.) Rather, Geocaris said that Johal was discharged because her position was eliminated. (*Id.*) The company did not hire a new Research and Development manager upon Johal's departure. (*Id.*) Instead, it hired a Corporate Chef. Johal contends that growing companies do not eliminate positions in Research and Development but offers no evidence in support of this proposition. Moreover, Johal does not dispute that Little Lady Foods was changing its organizational structure in response to the company's growth, the new and more sophisticated customers it had acquired, and the

increased technical requirements of the USDA. Nor does Johal deny that Little Lady Foods subsequently hired a Corporate Chef who had formal culinary training to meet the demands of its new customers. She also does not dispute that she did not communicate with her new supervisor, Paula Gerlat. Finally, Johal does not dispute that Little Lady Foods received complaints from Heinz about her job performance. As such, Johal fails to show that Little Lady Foods discharged her for reasons other than the ones the company articulated: that the company's changing and more sophisticated customer base necessitated a reorganization of its Quality Assurance and Research and Development Departments to meet new needs; that the company chose to eliminate Johal's position based in part on customer complaints about her proficiency; and that she refused to speak to her new supervisor and openly resisted the organizational changes taking place as the company grew.

Johal also contends that the reasons stated for her termination are a pretext for discrimination because Little Lady Foods had previously used the elimination of a position as a means to avoid a potential claim for wrongful termination. (Pl.'s LR 56.1(b)(3)(B) PP119-23). She claims that Robert Gannett used this method in early 1992 to discharge George Balsamo, who held the Quality Assurance Manager position just prior to Johal's joining the company. (*Id.* P119.) That position remained vacant for six months until Johal was hired. (*Id.*) Johal asserts that John Geocaris used this method to discharge Gannett, a white male, and Gerlat, a white female, but offers no evidence to prove her assertion; nor does she provide evidence that the company wrongfully terminated either Gannett or Gerlat. Thus, the only evidence she offers that Little Lady Foods cloaked wrongful terminations under the euphemism "elimination of position" relates to Gannett's decision to discharge Balsamo, whose color and national origin is unknown and who she admits was discharged for poor performance. (*See id.* P119.)

As she cannot show that Balsamo's position was terminated for reason other than cause or that his dismissal was somehow linked to her own, Johal fails to prove that John Geocaris used the technique of eliminating positions as a pretext for discrimination. The incidents surrounding Balsamo's dismissal are therefore irrelevant to her dismissal. Accordingly, Johal fails to establish that Little Lady Foods used the elimination of her position as a pretext for racial discrimination.

Finally, Johal testified in her deposition that other employees told her that Kevin O'Rourke made several statements about Asians and workers who reported to Robert Gannett. (Def.'s LR 56.1 PP126, 128, 130, 136.) Johal admits that none of these comments were made directly to her. (*Id.* P133.) These statements are inadmissible hearsay and cannot be used to defeat Defendant's summary judgment motion. Even if they were not hearsay, Johal must show that the comments were somehow related to the company's decision to discharge her. *See Ritter v. Hill 'N Dale Farm, 231 F.3d 1039, 1044 (7th Cir. 2000)*; *Robin v. Espo Eng'g Corp., 200 F.3d 1081, 1089 (7th Cir. 2000)*; *Hoffman v. MCA, Inc., 144 F.3d 1117, 1124 (7th Cir. 1998)*. Pretext is "not demonstrated by isolated statements unrelated to the employment decision at issue." *Ritter, 231 F.3d at 1044.*

It is well established that allegedly discriminatory comments issued by any one other than the person who made the termination decision are not sufficient to establish pretext. *See Bahl v. Royal Indem. Co., 115 F.3d 1283, 1293 n.11 (7th Cir. 1997)*. Johal admits that O'Rourke played no role in the either the decision to eliminate the Research and Development position or the decision to discharge her. (Def.'s LR 56.1 PP115-16.) Given that Geocaris, not O'Rourke, was the decision-maker, Johal cannot use O'Rourke's comments to show that Geocaris was lying about the real reasons for her discharge.

Johal likewise offers no evidence to show that O'Rourke's alleged comments influenced Geocaris' decision. The more tenuous the connection between the alleged comments and the adverse employment action, the less evidentiary value the comments hold. *Schuster, 327 F.3d at 576*; *see Huff, 122 F.3d at 386* (noting that proximity in time to the alleged discrimination is an appropriate consideration when assessing probative value). As Johal fails to show evidence of any connection between O'Rourke's alleged comments and Geocaris's decision to terminate her, she cannot use them to show evidence of pretext.

Johal has failed to present evidence tending to establish that Little Lady Foods' articulated reasons for her discharge were false, that Little Lady Foods used the elimination of positions as a cover for wrongful terminations, or that there was any connection between the company's decision to discharge her and the discriminatory comments allegedly made by O'Rourke. As such, no material question of fact exists as to whether the reasons Little Lady Foods articulated for discharging Johal served as a pretext for discrimination. The Court therefore grants Little Lady Foods' motion for summary judgment.

CONCLUSION

For the foregoing reasons, this Court grants in part and denies in part Defendant's Motion to Strike [doc. no. 36-1] and grants the Defendant's motion for summary judgment [23-1].

SO ORDERED

ENTERED: JUL 29 2004

HON. RONALD A. GUZMAN

United States Judge

No. 04-3261
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROBIN JOHAL,
Plaintiff-Appellant,

v.

LITTLE LADY FOODS, INC.,
Defendant-Appellee.

February 14, 2006, Decided

NOTICE: RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

JUDGES: Before Hon. JOHN L. COFFEY, Circuit Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

OPINION: ORDER

On January 31, 2006, the plaintiff-appellant filed a petition for rehearing. All the judges on the panel have voted to deny a rehearing. The petition is therefore DENIED.

No. 04-3261
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROBIN JOHAL,
Plaintiff-Appellant,
v.
LITTLE LADY FOODS, INC.,
Defendant-Appellee.

July 5, 2005

Before Hon. Ilana Diamond Rovner, Circuit Judge

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 02 C 8481--Ronald A. Guzman, Judge.

The fillowing are before the court:

1. MOTION TO STRIKE, filed on June 2, 2005, by counsel for appellee.
2. RESPONSE TO MOTION TO STRIKE, filed on June 20, 2005, by counsel for the appellant.

IT IS ORDERED that the motion is DENIED.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JUL 26 2006
OFFICE OF THE CLERK

No. 05-1499

IN THE

Supreme Court of the United States

ROBIN JOHAL,

Petitioner,

v.

LITTLE LADY FOODS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Little Lady Foods, Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

I. Nature of the Case

This matter involves a claim by Plaintiff, Robin Johal ("Plaintiff" or "Johal"), a former employee of Defendant, Little Lady Foods, Inc. ("Little Lady Foods" or "Defendant") alleging sex, color, race, national origin and age discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. ("Title VII") and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. ("ADEA").

II. Proceedings and Disposition Below

Plaintiff filed a one-count Complaint against Little Lady Foods in the United States District Court for the Northern District of Illinois based on federal question jurisdiction pursuant to 28 U.S.C. § 1331 alleging that Little Lady Foods discriminated against her because of her age, race, color, sex and religion. (R.1.) Little Lady Foods filed an Answer and Affirmative Defenses to Plaintiff's Complaint, denying all material allegations and claiming *inter alia* that Little Lady Foods terminated Plaintiff's employment for legitimate, non-discriminatory reasons. (R.3.)

Plaintiff subsequently filed an Amended Complaint dismissing the allegation of discrimination based upon her religion, (R.10) to which Little Lady Foods filed an Answer and Affirmative Defenses generally denying all material allegations and asserting the same general Affirmative Defenses as in its Answer to Plaintiff's original Complaint. (R.12.)

Little Lady Foods points out that neither Plaintiff's original Complaint, nor her Amended Complaint, specifically state that she was bringing an action for discrimination based

upon her national origin. (R.1; R.10.) However, based upon information disclosed by Plaintiff in her Answers to Interrogatories and deposition, Plaintiff indicated that she was making allegations that she was discriminated against because of her national origin. (R.21 at Ex. C, ¶ 5; Ex. B, p. 187-190.)

Little Lady Foods filed a Motion for Summary Judgment. (R.23.) Plaintiff filed her Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment four days late without advance leave of court. (R.29.) Contemporaneous to filing its Reply in Support of its Motion for Summary Judgment, (R.38) Little Lady Foods also filed a Motion to Strike certain information contained in Plaintiff's Memorandum of Law in Opposition to Little Lady Foods' Motion for Summary Judgment. (R.36.)

On July 29, 2004, the district court granted Little Lady Foods' Motion for Summary Judgment in its entirety, granted in part and denied in part Little Lady Foods' Motion to Strike, and entered judgment in favor of Little Lady Foods and against Plaintiff (Pl.'s Pet. Cert. at 8a-41a.) [1]

On August 24, 2004, Plaintiff filed a Motion to Reconsider the district court's July 29, 2004 court order granting Little Lady Foods' Motion to Strike in part and granting Little Lady Foods' Motion for Summary Judgment. (R.43.) Plaintiff also requested leave to file supplemental documents and for an extension of time to file her Notice of Appeal. (R.44.) On August 25, 2004, the district court entered a briefing schedule as to Plaintiff's Motion to Reconsider.

1. The district court's opinion attached to Plaintiff's Petition for Writ of Certiorari does not contain the footnotes from the opinion and is consequently incomplete. The complete and accurate opinion can be found at *Johal v. Little Lady Foods, Inc.*, 2004 U.S. Dist. LEXIS 14777 (N.D. Ill. 2004).

(R.45.) On August 30, 2004, Plaintiff filed an Ex-Parte Motion for an Extension of Time to file her Notice of Appeal, (R.47) which the court denied on the same date. (R.48.) As part of the district court's August 30, 2004 court order, it also vacated its August 24, 2004 order and denied Plaintiff's Motions to Reconsider and Leave to File Supplemental Documents. (Id.) Plaintiff filed a Notice of Appeal on August 30, 2004. (R.46.)

On April 1, 2005, Plaintiff filed her Appellant's Brief with the United States Court of Appeals for the Seventh Circuit (Pl.'s Appellant Br.) On Appeal, Plaintiff abandoned her claims of age discrimination in violation of the ADEA and Title VII sex discrimination. (Pl.'s Appellant Br. at 23.) Therefore, before the Seventh Circuit Plaintiff's claims were limited to discrimination based on race, color and national origin.

Little Lady Foods filed its Response to Appellant's Brief on June 2, 2005 (Def.'s Resp. Appellant's Br.), and Plaintiff filed its Reply Brief on June 15, 2005 (Pl.'s Reply Br.) After both parties presented their case at oral argument before a panel of the Seventh Circuit, the Seventh Circuit issued an opinion and order on January 17, 2006 affirming the district court's order granting Little Lady Food's Motion for Summary Judgment. *See Johal v. Little Lady Foods, Inc.*, 434 F.3d 943 (7th Cir. 2006); (Pl.'s Pet. Cert. at 1a-7a.) On January 26, 2006, the Seventh Circuit issued a Corrected Judgment with the same ruling.[2] Plaintiff filed a Petition for Rehearing, which the Seventh Circuit denied on February 14, 2006. (Pl.'s Pet. Cert. at 42a.)

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2. Plaintiff did not include the Seventh Circuit's Corrected Judgment in its Petition for Writ of Certiorari, and it is not published.

STATEMENT OF FACTS

A. Early Stages of Plaintiff's Employment at Little Lady Foods

Plaintiff was born in India. (R.27 ¶ 1.)[3] She graduated from the University of Washington with a degree in food science technology. (R.27 ¶ 2.) Little Lady Foods hired Plaintiff in August of 1992. (R.20 ¶ 7.)

Plaintiff's first position at Little Lady Foods was as the Quality Assurance Manager, and she was hired to set up a Quality Assurance system for Little Lady Foods. (R.20 ¶¶ 8-9.) In 1992, Little Lady Foods was a small company with less than $10 million in sales. (R.20 ¶ 10.) In 1992, Little Lady Foods was basically only making pizza crusts and pizzas for their own pizza line, Bravissimo. (R.20 ¶ 11.) When Plaintiff was hired, Little Lady Foods did not have a Quality Assurance Department, (R.20 ¶ 12) but it did have a Research and Development Department that reported to John Geocaris. (R.20 ¶ 13.) Over the course of Plaintiff's employment, Little Lady Foods would attach the responsibilities associated with the Research and Development Manager's position to her job whenever the Research and Development Manager would leave the company. (R.20 ¶ 14.)

Research and Development and Quality Assurance are two very separate departments with very different functions for the company. (R.20 ¶ 15.) The only similarity between the two positions is the term "manager." (R.20 ¶ 20.) Research and Development is responsible for product development, developing the product and setting up the initial specifications. (R.20 ¶ 16.) Quality Assurance is responsible

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3. Defendant cites to the Record on Appeal as (R.__.) The number immediately following the R. is the number corresponding to that document as referenced on the civil docket sheet for the district court.

for finalizing the specifications for production on the Little Lady Foods' lines and implementing the production of the product. (R.20 ¶ 17.) During the early stages of Plaintiff's employment, the departments were independent and run by different people. (R.20 ¶ 18.)

From 1992 through April 2000, Plaintiff's title was Quality Assurance Manager but she occasionally performed the functions of the Research and Development Manager, as well. (R.20 ¶ 21.) From 1999 through April 2000, Plaintiff was responsible for both Quality Assurance and Research and Development. (R.20 ¶ 22.) During this same time period, Plaintiff's supervisor was Robert Gannett. (R.27 ¶ 20.)

B. 2000 Separation of Research and Development and Quality Assurance

Little Lady Foods hired a new Vice President of Operations, Kevin O'Rourke, in March 2000. (R.20 ¶ 23.) The change in Vice President of Operations from Robert Gannet to Kevin O'Rourke also prompted changes in the reporting structure of the Technical Services Department. (R.20 ¶ 24.) In April 2000, Little Lady Foods made the decision to separate Quality Assurance and Research and Development into two departments with a manager for each department. (R.20 ¶ 25.) Little Lady Foods made the decision to separate the two departments based on the changing needs of the company and to accommodate the continued growth of the company. (R.20 ¶ 26.)

Once the decision to separate the Quality Assurance and Research and Development Departments was made, John Geocaris and Dan Geocaris met with Plaintiff to advise her of the reorganization. (R.20 ¶ 27.) During that meeting, Plaintiff was offered either the Quality Assurance Manager or Research and Development Manager position. (R.20 ¶ 28.)

Plaintiff was advised that the reason for the reorganization was to accommodate the anticipated growth of Little Lady Foods and increase the technical skills of the department. (R.20 ¶ 29.) Plaintiff chose the position of Research and Development Manager in April 2000 and began in that role approximately two weeks later. (R.20 ¶ 30.) A manager, Alissa Leconti, was hired to supervise Quality Assurance during the summer of 2000. (R.20 ¶ 31.)

C. Plaintiff's Performance as Research and Development Manager

Once Plaintiff accepted the position of Research and Development Manager, her supervisor was Dan Geocaris, Vice President of Sales and Marketing. (R.20 ¶ 32.) Plaintiff's primary responsibility was to work with the customers and with various areas of the company to develop products. (R.20 ¶ 33.)

As Research and Development Manager, she was responsible for resourcing raw materials. (R.20 ¶ 34.) Plaintiff was responsible for developing acceptable prototypes for the customers that could be manufactured by Little Lady Foods and produced at a profitable level. (R.20 ¶ 35.) Plaintiff would be presented a project and she would be responsible for thinking through the scope of the project and determining how to create the prototype of sample the customer was looking for. (R.20 ¶ 36.) At the beginning of her tenure as Research and Development Manager, Plaintiff was also responsible for internally managing one or two assistants. (R.20 ¶ 37.)

During Plaintiff's tenure as Research and Development Manager, Little Lady Foods was actively pursuing the H.J. Heinz Weight Watchers SmartOnes Pizza account. (R.20 ¶ 38.) Plaintiff, along with members of the sales department

and John Geocaris, met with representatives of H.J. Heinz to discuss the production of Weight Watchers SmartOnes Pizza. (R.20 ¶ 39.)

While Plaintiff was Research and Development Manager, Little Lady Foods started receiving complaints from customers about her performance. (R.20 ¶ 40.) Little Lady Foods' internal sales associates also began complaining about Plaintiff's lack of technical knowledge and expertise in product development. (R.20 ¶ 41.) Little Lady Foods' internal sales associates observed Plaintiff during customer meetings and witnessed her making unrealistic representations to customers. (R.20 ¶ 42.) Plaintiff would represent to customers that Little Lady Foods would be able to produce products for costs that were unrealistic and impossible for Little Lady Foods to follow through. (R.20 ¶ 43.)

Dan Geocaris met with Plaintiff during her tenure as Research and Development Manger to discuss her performance deficiencies and the complaints he received. (R.20 ¶ 44.) Although Plaintiff received verbal reviews from her former supervisor, the first written review did not begin until the reorganization of the Technical Services Department. (R.20 ¶ 45.) Plaintiff's August 29, 2000 performance review noted that she had done a nice job with Heinz but also indicated areas of deficiencies. (R.20 ¶ 46.) Plaintiff's August 29, 2000 performance review contained the phrase "Excellent Job," which was a direct reference to her involvement on the Heinz project. (R.20 ¶¶ 47-48.)

Plaintiff's January 18, 2001 performance review noted that she needed to improve her Technical Job Knowledge. (R.20 ¶ 49.) The January 18, 2001 performance review also stated that Plaintiff "needed to show more creativity with receipts when necessary and have fun making new products." (R.20 ¶ 50.) Plaintiff's January 18, 2001 performance review

noted that she needed to "develop a rapport with all managers." (R.20 ¶ 51.) Her supervisor, Dan Geocaris, checked areas on the performance reviews that needed to be improved, and pending improvement her salary was frozen for the first three months of 2001. (R.20 ¶ 52.)

D. The H.J. Heinz Weight Watchers SmartOnes Pizza Account

Little Lady Foods successfully obtained the H.J. Heinz Weight Watchers SmartOnes Pizza account in 2000. (R.20 ¶ 65.) H.J. Heinz was the most complex of the customers that Little Lady Foods had through the year 2001. (R.20 ¶ 66.) The Weight Watchers SmartOnes account consisted of the production of five different pizzas. (R.20 ¶ 67.) Development for the Weight Watchers SmartOnes products began in approximately November 2000 and the first sales started occurring in March of 2001. (R.20 ¶ 68.) Peter Cokinos had primary responsibility for the H.J. Heinz account and Plaintiff was a member of the team that worked on obtaining the account. (R.20 ¶ 69.)

Because Weight Watchers SmartOnes Pizza was a dietary product, Heinz had their own Culinary Team in San Francisco that developed the recipes. (R.20 ¶ 70.) Plaintiff's primary responsibility with the Weight Watchers SmartOnes Pizza account was to take the information provided by H.J. Heinz and transfer it to the Little Lady Foods' Process Sheets. (R.20 ¶ 71.) The Process Sheets would then be used by Manufacturing to set up production. (R.20 ¶ 72.)

E. Complaint's about Plaintiff's Performance from H.J. Heinz

Little Lady Foods received complaints from H.J. Heinz about Plaintiff's performance as the Research and Development Manager. (R.20 ¶ 73.) The complaints about

her performance began in April 2000 and continued through July 2001. (R.20 ¶ 74.) Susan Kay, Product Development Technician for H.J. Heinz, worked primarily with the Technical Services Department and Plaintiff on product development. (R.20 ¶ 75.) Susan Kay complained to Little Lady Foods that Plaintiff was unable to follow directions. (R.20 ¶ 76.) Susan Kay also complained to Little Lady Foods that Plaintiff lacked good judgment and failed to proof read her work, which resulted in error-laden work being provided to H.J. Heinz. (R.20 ¶ 77.) Peter Cokinos and Dan Geocaris advised Plaintiff of the complaints. (R.20 ¶ 78.)

F. Plaintiff's Resistance of the 2001 Reorganization of Technical Services

The H.J. Heinz Weight Watchers SmartOnes Pizza account prompted Little Lady Foods to consider further reorganization in the Technical Services Department. (R.20 ¶ 79.) As technical requirements of the customers increased, weaknesses in Little Lady Foods Technical Services Department became apparent to John Geocaris. (R.20 ¶ 57.)

Based on the complaints received from Heinz about the lack of technical knowledge of the Research and Development and Quality Assurance Managers, Little Lady Foods determined that an individual with technical experience was needed to supervise both departments. (R.20 ¶ 81.) The increased technical requirements of the United States Department of Agriculture also influenced the decision to reorganize the Technical Services Department. (R.20 ¶ 83.) The Quality Assurance Manager, Alissa Leconti, was terminated during the reorganization for poor performance. (R.20 ¶ 82.)

John Geocaris and Dan Geocaris discussed the creation of a new position that would oversee both Quality Assurance and Research and Development in the beginning of 2001. (R.20 ¶ 84.) Discussions about the reorganization of Quality Assurance and Research and Development were held during management meetings while Little Lady Foods was in the midst of the Heinz Weight Watcher's production. (R.20 ¶ 85.) The discussions focused on what needed to be done to match the expectations of the more demanding and technically advanced customers. (R.20 ¶ 86.) The discussions were not focused on specific jobs or individuals but on what had to be done to take Little Lady Foods from a $25 million company to a $45 million company, which occurred in one year of the Heinz project. (R.20 ¶ 118.) Because of the technical complexity of the Heinz project and anticipated future projects, Little Lady Foods reorganized the department to meet the sophisticated customers' needs. (R.20 ¶ 80.)

When the decision to hire a Director of Technical Services was made to oversee both Research and Development and Quality Assurance, Plaintiff was upset that Little Lady Foods was merging the departments again and she was not going to be in charge. (R.20 ¶ 58.) The Director of Technical Services, Paula Gerlat, was hired in May 2001. (R.20 ¶ 59, 88.) Plaintiff resisted the reorganization of Little Lady Foods. (R.20 ¶ 53.) Plaintiff believed that in the long term it was best for Little Lady Foods to keep the departments, Research and Development and Quality Assurance, together. (R.20 ¶ 54.) Plaintiff told Mike Eisel that she did not believe the Director of Technical Services was qualified for the position and she should have gotten the job. (R.20 ¶ 56.) Plaintiff refused to acknowledge that the Director of Technical Services was her supervisor and that she had to report to her. (R.20 ¶ 60.) Plaintiff would not

speak to her supervisor, the Director of Technical Services, from May 2001 through the end of her employment. (R.20 ¶ 61.) Plaintiff was warned by Dan Geocaris that refusing to speak to a supervisor was not behavior tolerated by Little Lady Foods. (R.20 ¶ 62.) Michael Eisel, a co-worker of Plaintiff, counseled her that if she refused to speak with her supervisor she was jeopardizing her position at Little Lady Foods. (R.20 ¶ 63.) Even with the counseling and warning, Plaintiff refused to acknowledge that the Director of Technical Services was her supervisor and would not speak to the individual in that position. (R.20 ¶ 64.)

Once a Director of Technical Services was hired, the reorganization of the Research and Development Department became the next focus. (R.20 ¶ 89.) In order to meet the needs of the sophisticated customer and continue to grow, Little Lady Foods determined it needed to create a position that required formal culinary training in the Research and Development Department. (R.20 ¶ 90.) At the time of the Heinz project, Little Lady Foods did not employ a corporate chef or even anyone with a formal culinary degree; therefore, a majority of its culinary work had to be outsourced to other companies. (R.20 ¶ 91.)

John Geocaris anticipated the head of Research and Development would need more formal culinary training in order to interact with the larger and more complicated customers, i.e. the Heinz's of the industry. (R.20 ¶ 94.) The head of Research and Development would not be as responsible for the technical aspects of the job and would now concentrate on product and sample development. (R.20 ¶ 95.) The technical requirements associated with the department would be handled by the Director of Technical Services, and eventually by the Vice President of Technical Services. (R.20 ¶ 96.) Little Lady Foods also wanted to

become more creative in the samples it provided its customers and provide innovative samples as opposed to samples that just satisfied the customer's request. (R.20 ¶ 97.) In order to provide innovative products and have the ability to create and expand on customer's requests, Research and Development needed to have a corporate chef at its helm. (R.20 ¶ 98.)

It became evident during the reorganization discussions that the responsibilities of the Research and Development manager could be redistributed to the newly created Corporate Chef, the Director of Technical Services and the Lead Research and Development Technician. (R.20 ¶ 99.) Plaintiff did not have any formal culinary training or a culinary degree. (R.20 ¶ 107.) John Geocaris decided to eliminate the Research and Development Manager position to meet the changing demands and for continued growth of the company. (R.20 ¶ 100.)

The decision to eliminate the Research and Development Manager was made in July 2001. (R.20 ¶ 92.) The decision to eliminate the Research and Development Manager position was based on several factors, including, the increased sophistication of the customers, the greater technical requirements of the United States Department of Agriculture and the need for greater culinary skill. (R.20 ¶ 93.) Plaintiff's lack of technical skills was not noticeable in a smaller company but with continued growth became more apparent. (R.20 ¶ 87.)

G. Termination of Plaintiff

Once the decision to eliminate the position had been made, John Geocaris consulted with Dan Geocaris, Vice President of Sales and Marketing, and the late Ruth Gillman, former Vice President of Human Resources, regarding Plaintiff's job performance in June 2001. (R.20 ¶ 101.)

John Geocaris was advised that there were a number of complaints from the Heinz representatives that worked with Plaintiff about her performance and that they questioned her technical abilities. (R.20 ¶ 102.) John Geocaris was also advised that Plaintiff refused to acknowledge the Director of Technical Services as her supervisor and did not speak to her. (R.20 ¶ 103.) Other complaints from the internal sales representatives were discussed regarding Plaintiff's unrealistic representations to customers. (R.20 ¶ 104.) John Geocaris was also aware that Plaintiff did not have any formal culinary training or a culinary degree. (R.20 ¶ 106.) According to John Geocaris, Plaintiff's lack of technical skills was not as noticeable four or five years prior when the company was smaller but was becoming critical to the continued growth of the company. (R.20 ¶ 111.)

Based on her performance issues, the reorganization of the department and the elimination of her position, John Geocaris made the decision to discharge Plaintiff in July 2001. (R.20 ¶ 110.) John Geocaris advised Plaintiff of her discharge at a meeting in July 2001. (R.20 ¶ 112.) During that meeting, John Geocaris advised Plaintiff that she was being discharged because her position had been eliminated. (R.20 ¶ 113.)

H. Subsequent Hiring at Little Lady Foods

After Plaintiff was discharged, the responsibilities of the Research and Development Manager position were primarily handled by the Lead Research and Development Technician, Elizabeth Valezquez, and the Director of Technical Services, Paula Gerlat. (R.20 ¶ 119.) Little Lady Foods hired Niki Bava as the Corporate Chef and to supervise the Research and Development Technicians in the third or fourth quarter of 2001. (R.20 ¶ 120.) In May 2002, Little Lady Foods hired Sue Ashton Becker as the Corporate Chef to replace Niki

Bava. (R.20 ¶ 121.)[4] In March 2002, Little Lady Foods hired Eric Johannsen as Vice President of Technical Services and eliminated the Director of Technical Services position. (R.20 ¶ 123.)

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Present any Compelling Reason for Review Under Supreme Court Rule 10 and the Writ Should Therefore be Denied

Supreme Court Rule 10 specifically states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.
>
> * * *
>
> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

SUP. CT. R. 10. In construing Supreme Court Rule 10, this Court held that "'special and important reasons' imply a reach to a problem beyond the academic or episodic." *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Further, certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties * * *." *Id.* at 79. (citations omitted).

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4. Little Lady Foods notes that its Rule 56.1(a)(3) Statement of Facts states that Sue Ashton Becker was hired in early 2001. (R.20 ¶ 121.) This is a typographical error, as John Geocaris' Affidavit states that she was hired in May 2002. (R.21, Ex. D, ¶ 49.)

There is no issue of public importance raised by Plaintiff in this case. Plaintiff first argues that the Seventh Circuit Court of Appeals decided an important federal question related to scope of review because it did not comment on every argument and piece of evidence offered by Plaintiff in support of her pretext argument. As this Court well knows, there is no rule or principal of law that requires a reviewing court to comment on every single point and piece of evidence raised by an appellant. Moreover, there is absolutely no reason to believe that the Seventh Circuit failed to give full consideration to all arguments and all evidence in the record. In addition to explaining why the pretext argument was rejected, the Seventh Circuit added that "the record does not support an inference of pretext." (Pl.'s Pet. Cert. at 4a.) In so stating, the Seventh Circuit informed Plaintiff that her arguments and evidence had been considered and rejected. Plaintiff's complaint that the scope of review was somehow limited not only has no significant public importance, it has no factual or legal basis to support it.

Plaintiff's second argument in attempting to convince this Court to accept this case is her contention that there is a split among the circuits on whether a plaintiff must prove that she was meeting her employer's legitimate expectations or was merely qualified for the position in proving her prima facie case under the *McDonnell Douglas* burden shifting method. Aside from the fact that Plaintiff has waived this argument because it was never raised below, it is an argument that has no significance to this case because the Seventh Circuit did not rely solely upon this issue in affirming the district court. Indeed, the Seventh Circuit held that Plaintiff failed to prove pretext as well. This argument also has no significant public importance because, as in this case, the different approaches to the prima facie case rarely, if ever,

have any practical impact on the determination of the case. Courts deciding a case under the *McDonnell Douglas* test typically also address pretext. Thus, regardless of how the court may have ruled on the prima facie case, the pretext analysis is often the controlling factor in the outcome of the case.

Finally, by Plaintiff's own admission, she concedes that a review of her evidence in this case has no national significance, stating "[w]hether Johal has established a genuine issue of material fact is important only to her. This issue has no national impact." (Pl.'s Pet. Cert. at 29.) Because there are no issues of national significance arising from this case, this Court should deny Plaintiff's Petition.

II. Plaintiff has No Basis to Dispute the Seventh Circuit's Conclusion That She Failed to Satisfy her Prima Face Case

A. Plaintiff Waived all Arguments Regarding the Standard Evaluating the Second Element of her Prima Facie Case Because She Never Raised This Argument in the Lower Courts

In the lower courts, Plaintiff conceded that the courts should examine whether she was meeting Little Lady Foods' legitimate expectations at the time she was terminated to determine whether Plaintiff satisfied the second element of her prima case. In her Petition for Certiorari, however, Plaintiff argues for the first time that the Seventh Circuit should have evaluated the second element of her prima facie case by looking at her objective qualifications.

This Court has long embraced the standard that it will not review a question not pressed or passed on by the courts below. *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988). Plaintiff's "objective qualifications" argument

should not be considered because it has never been raised before or addressed by the lower courts.

In the lower courts, Plaintiff focused on evidence as to whether she was meeting Little Lady Foods' legitimate performance expectations. In Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and in her Appellant's Brief filed with the Seventh Circuit, she addressed her performance in connection with the second element of her prima facie case by pointing to her perception of the impact of her 2001 performance review, bonuses and a raise, and the fact that John Geocaris did not make any references to her performance deficiencies when she was terminated. (R.32 at 10, 11; Pl.'s Appellant Br. at 24-25.)

At no time did Plaintiff ever discuss the second element of the prima face case in relation to her "objective" qualifications. Nor did Plaintiff ever urge either of the lower courts to examine her "objective" qualifications (i.e., academic background or degrees earned), as the criteria to determine if she satisfied the second element of her prima face case.

In addition, the issue raised by Plaintiff with respect to her objective qualifications for either the Manager of Research and Development or Director of Technical Services is not presented by the record with sufficient clarity. (*See Mishkin v. New York*, 383 U.S. 502, 512-13 (1966)) ("The far-reaching and important questions tendered by the claim are not presented by the record with sufficient clarity to require or justify their decision.")

B. There is Little Difference Between the Approaches of the Circuits

Plaintiff notes that some Circuit Courts of Appeals, in particular the Fifth and Sixth Circuits, have applied an "objective qualifications" test to the *McDonnell Douglas* prima facie case as opposed to the "legitimate expectations" test followed by the Seventh Circuit and at least three other Circuit Courts of Appeals. It makes little to no difference what test a court follows because in the end the court invariably will engage in a pretext analysis, making the difference in the prima facie case analysis essentially meaningless. When the court considers the pretext issue, it will in many cases then be obliged to consider whether the plaintiff met the legitimate expectations of the employer. The fact that some courts prefer to look at this issue only at the pretext stage as opposed to looking at it in the prima facie case makes no difference to the outcome of the case. Rather, it is simply an attempt to be more efficien' As the Fifth Circuit noted, "Placing a plaintiff's 'qualifications' in issue at both the prima facie case and pretext stages of a termination case is unnecessary redundancy." *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1505 (5th Cir. 1988).

This Court consistently holds the prima facie case established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). In this regard, to the extent courts apply somewhat different standards used to evaluate the second element of the prima facie case, this Court has made clear that it is perfectly acceptable to do so based upon the specific facts presented in the case.

C. Plaintiff Could Not Satisfy the Second Element of her Prima Facie Case Under the "Objective Qualifications" or "Legitimate Expectations" Tests

Regardless of what standard is applied to Plaintiff's prima facie case, her claim fails. Interestingly, in her Petition Plaintiff fails to set forth any evidence to show that she would have met the second element of her prima facie case under the "objective qualifications" test. Specifically, Plaintiff fails to identify the position for which she claims she is qualified.

In her Petition, Plaintiff re-hashes her factual arguments in support of her claim that she met Little Lady Foods' legitimate performance expectations, which is the standard she espoused in both the district court and the Seventh Circuit. However, Plaintiff fails to set forth any evidence in the record to demonstrate how the Seventh Circuit's ruling on this issue was flawed. Specifically, the Seventh Circuit rejected her speculative argument that the fact that Little Lady Foods paid her a bonus when she was terminated is indicative of her performance. As the Seventh Circuit correctly held, and which Plaintiff failed to dispute in her Petition, "We cannot endorse Johal's belief" that payment of a discretionary bonus is indicative of or related to her performance. (Pl.'s Pet. Cert. at 4a.)

Plaintiff also fails to show that the Seventh Circuit erred when it rejected her argument that the job evaluation she received six months prior to her termination is indicative of her performance at the time she was terminated. (*Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332, 336 (7th Cir. 1991)) (the court must focus on plaintiff's performance at the time of his termination because "the fact that an individual may have been qualified in the past does not mean he is qualified at a later time.")

D. The Court Previously Declined to Review This Issue

Little Lady Foods has uncovered one other case where a party raised the argument regading the objective qualifcations test in a petition for certiorari to this Court, and this Court declined to review it. *See Gerth v. Sears, Roebuck & Co.*, 1996 U.S. App. Lexis 22577 (6th Cir. 1996), *cert. denied*, 519 U.S. 1092 (1997) (No. 96-774). No significant legal developments have taken place since this Court denied the petition for a writ of certiorari in *Gerth*. Accordingly, Plaintiff's Petition should be denied for this reason alone.

III. Plaintiff Failed to Produce Evidence of Pretext

A. A Court of Appeals is Not Required to Address Each Issue Raised by the Parties in its Opinion

The thrust of Plaintiff's argument regarding pretext is that the Seventh Circuit must not have considered two of her arguments because they were not discussed in the opinion.

Initially, Plaintiff incorrectly mischaracterizes the Seventh Circuit's opinion as "omitting" from its discussion Plaintiff's evidence in support of pretext, and simply "concluding" that Little Lady Food's explanation for her termination was sufficient because it "would not question the wisdom" of Little Lady Foods. To the contrary, the Seventh Circuit specifically stated:

> * * * Johal argues that one of the nondiscriminatory reasons LLF cited for discharging her— that it had eliminated her position—was pretextual. Specifically, she contends that a genuine issue of material fact exists about whether LLF eliminated her former position as R&D manager. But the record does not support an inference of pretext.

(Pl.'s Pet. Cert. at 4a.) The literal text of the Seventh Circuit's opinion shows that it considered Plaintiff's argument that

Little Lady Foods' explanation for her termination, that it eliminated her position, was pretext and found no support for her claims in the record. In the remainder of its opinion, the Seventh Circuit concluded that the record was consistent with Little Lady Foods' position that it acted consistently with its need to meet its increasing demands. (Id.) The Seventh Circuit noted that it is not the court's role to question the wisdom of a company's decision. (Id. at 4a-5a.) This is not to say that the Seventh Circuit refused to consider Plaintiff's arguments; rather, it found no support in the record for them.

Plaintiff seems to conclude that a court's duty to review the record in deciding an appeal means that it must articulate each and every factual argument brought before the court in its written opinion. There is of course no such obligation. Indeed, Seventh Circuit Rule 53 provides that the Court of Appeals may decide an appeal by an unpublished order with an omission of the statement of facts, and it may also issue an order from the bench. *See* 7th Cir. R. 53.

Contrary to Plaintiff's argument, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), says nothing to support her overreaching argument that if a court does not articulate an argument in its opinion, the court did not consider it. Rather, in *Reeves*, the Court found that the Fifth Circuit failed to take into account plausible evidence, which allowed plaintiff to establish a prima facie case. In the case *sub justice*, Plaintiff is requesting a "discussion" of her flawed arguments, which even if articulated by the Seventh Circuit in greater detail, would not warrant reversal of the district court's order granting Little Lady Foods summary judgment.

Just as this Court directed in *McDonnell Douglas*, Plaintiff was given several opportunities to demonstrate that

Little Lady Foods' stated reason for her termination was pretextual. Plaintiff fails to recognize that the lower courts correctly found that her arguments in support of pretext were not supported by the record and were otherwise legally flawed, not simply because the Seventh Circuit would not question Little Lady Foods' decision. Plaintiff's reliance on *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), is also misplaced. Plaintiff, unlike the plaintiff in *Hicks*, failed to meet her burden to show that Little Lady Foods' stated reason for her termination was false, and Plaintiff failed to elicit any evidence that discrimination was the true reason for her termination. (Plaintiff must show both that the reason was false, and that discrimination was the real reason. *See Id.* at 515.) Further, unlike the employees in *McDonnell Douglas* and *Hicks*, Plaintiff never even satisfied her prima facie case.

B. Plaintiff's Pretext Arguments are Flawed and Consequently Did Not Warrant Specific Discussion by the Seventh Circuit

Plaintiff fails to set forth sufficient evidence of pretext. As this Court held, plaintiff must show that the employer's stated reason for the employment action was false, and that discrimination was the real reason. *See Hicks*, 509 U.S. at 515.

The district court found and the Seventh Circuit correctly affirmed:

> * * * [John] Geocaris said that Johal was terminated because her position was eliminated. (Id.) The company did not hire a new Research and Development manger upon Johal's departure. (Id.) Instead, it hired a Corporate Chef. * * * Moreover, Johal does not dispute that Little Lady

> Foods was changing its organizational structure in response to the company's growth, the new and more sophisticated customers it had acquired, and the increased technical requirements of the USDA. Nor does Johal deny that Little Lady Foods subsequently hired a Corporate Chef who had formal culinary training to meet the demands of its new customers. She also does not dispute that she did not communicate with her new supervisor, Paula Gerlat. Finally, Johal does not dispute that Little Lady Foods received complaints from Heinz about her job performance. As such, Johal fails to show that Little Lady Foods discharged her for reasons other than the ones the company articulated * * *

(Pl.'s Pet. Cert. at 38a-39a, 4a-5a.) Plaintiff takes issue that the Seventh Circuit did not discuss her contention that the position of Director of Technical Services ("DTS") is merely a continuation of her position as Manager of Research and Development. This argument was not even properly before the Seventh Circuit because Plaintiff never raised it before the district court. "It is a well settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses, it cannot raise such reasons on appeal." *Sanders v. Vill. of Dixmoor*, 178 F.3d 869, 870 (7th Cir. 1999) (*citing Liberles v. County of Cook*, 709 F.2d 1122, 1126 (7th Cir. 1983)).

In any event, this argument is not supported by the facts. Plaintiff's characterization of the facts on this point has been inconsistent and unpersuasive. In the district court, Plaintiff admitted that her job duties were distributed among the newly created position of Corporate Chef, the DTS and the Lead

Research and Development Technician. (R.26 ¶ 199.) While appealing to the Seventh Circuit, however, Plaintiff changed her story and argued that that the job duties of the DTS are a consolidation of the Manager of Research and Development and Manager of Quality Assurance. (Pl.'s Appellant Br. at 29.)

Plaintiff also argued before the district court that portions of the job description for the DTS relating only to research and development were substantially similar to the job description of Manger of Research and Development. (R.27 ¶ 100.) However, while appealing to the Seventh Circuit, Plaintiff argued that the job duties of the DTS were a consolidation of the duties of both the Manger of Research and Development and the Manager of Quality Assurance. (Pl.'s Appellant Br. at 29.) In her Petition for Certiorari, Plaintiff changed her position yet again, and described the duties of the DTS as incorporating those of the Manager of Research and Development, quality assurance and technical services, all of which she believes she is qualified to do. (*See e.g.*, *Williams v. Williams Elecs., Inc.*, 856 F.2d 920, 924 (7th Cir. 1988)) (Plaintiff cannot create a question of material fact as pretext by pointing to her own positive perception of her experience, performance and abilities; rather it is only the perception of the decisionmaker, John Geocaris, which is relevant.)

Regardless of Plaintiff's inconsistent stories, the unrefuted evidence in the record, which consists of John Geocaris' deposition testimony, is that the position of DTS and Manager of Research and Development are distinct; one position supervises the other. (R.37 ¶ 100.)

Plaintiff's second argument in support of pretext that she claims the Seventh Circuit overlooked is that Little Lady Foods used job elimination as the reason it terminated another

employee, George Balsamo, almost nine years prior to Plaintiff's termination. (R.27 ¶ 119.) Plaintiff ignores the deficiencies in her argument noted by the district court, which properly concluded that this evidence was irrelevant. The district court correctly held that Plaintiff did not support this argument with relevant evidence, such as Balsamo's color or national origin, that Balsamo was terminated for any reason other than cause, that his dismissal was somehow linked to her own, or that John Geocaris used this technique as pretext for discrimination. (Pl.'s Pet. Cert. at 39a-40a.)

Plaintiff incorrectly cites *Bellavar v. Quanex Corp.*, 200 F.3d 485, 494 (7th Cir. 2000), for the proposition that evidence that an employer falsely used a mini-RIF as the basis to terminate an employee is evidence that the use of that same reason to terminate another employee five years later could be evidence of pretext. In *Bellavar*, the employer in a sex discrimination lawsuit admitted to manipulating the use of the term RIF in the past as a basis to terminate another female employee five years earlier, when the RIF was not the true reason.

The court in *Bellavar* focused its decision to reverse summary judgment in favor of the employer based upon evidence that the employer held plaintiff to a double standard. *Id.* at 495. The court never discussed its decision to reverse summary judgment because of the employer's prior use of a RIF as the explanation used to terminate another employee. Further, in *Bellavar*, the plaintiff and the employee terminated five years earlier were in the same protected class. In the instant case, Plaintiff failed to elicit evidence regarding Balsamo's color and national origin, such that there is no basis to conclude that the trial court erred in finding Plaintiff's argument irrelevant.

In sum, the Seventh Circuit is not obligated to mention or discuss each and every argument raised in briefs submitted for it consideration. Regardless, the arguments raised by Plaintiff are not legally sound and do not warrant a reversal of the district court's order. Ultimately, Plaintiff did not meet her burden in showing that Little Lady Foods' stated reasons for her termination were pretextual.

IV. The Seventh Circuit Did Not Err in Refusing to Consider Plaintiff's Incomplete Statistical Data as Evidence of Discrimination

The Seventh Circuit did not err in refusing to consider Plaintiff's incomplete statistical data as evidence of discrimination. In her Petition, Plaintiff blatantly fails to acknowledge the correct legal basis upon which the lower courts properly rejected her incomplete statistical data as evidence of discrimination. As the district court correctly held:

> Even reading all disputed facts in her favor, as the Court must, this incomplete statistical data, however, is insufficient to survive summary judgment. To show disparate treatment between comparable individuals, Johal would not only need to include information about the national origin [and] color * * * of the individuals involved in the personnel changes but also the relative qualifications of such individuals. *See, e.g., Swanson v. Legett & Platt, Inc.*, 154 F.3d 730, 734 (7th Cir. 1998) (data not considered probative because does not contain the qualifications of the individuals retained, hired, or demoted); *Fisher v. Wayne Dalton Corp.*, 139 F.3d 1137, 140-41 (7th Cir. 1998) (statistical evidence not probative because it failed to rule out potential explanatory

> variables). Without information about the employees' relative qualifications, it is impossible to infer discriminatory intent from the data Johal provides. *See Vanasco v. Nat'l-Louis Univ.*, 137 F.3d 962, 967 (7th Cir. 1998) (chart showing ages of instructors granted and denied tenure not probative because it showed instructors' ages but not their relative qualifications and, therefore plaintiff did not provide enough information from which to infer age bias).

(Pl.'s Pet. Cert. at 27a-28a.) The Seventh Circuit correctly pointed out:

> * * * [H]er brief does not rectify the flaw that was fatal on this point in the district court: the failure to provide any information about the relative qualifications of the various upper managers who were retained, hired, or demoted.

(Pl.'s Pet. Cert. at 5a.) Similarly, Plaintiff fails to correct her fatal flaw in her Petition before this Court because the record is devoid of the critical evidence that Plaintiff would need to rely upon to support her claim, including the qualifications, the color and national origin of Little Lady Foods' upper management who were retained, hired or demoted.

CONCLUSION

For the foregoing reasons, Little Lady Foods, Inc. respectfully requests that this Court deny Plaintiff's Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ROBIN JOHAL, PETITIONER

v.

LITTLE LADY FOODS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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I. Petitioner preserved for review the issues (a) of "qualification" as a part of the *prima facie* case and (b) of elimination of position as "pretext".

A. *Qualification.* Little Lady Foods, Inc. ("LLF") is wrong in its assertion that Robin Johal ("Johal") did not raise the issue of qualification in the lower courts. In her memorandum of law presented to the District Court in opposition to the motion for summary judgment of LLF ("DC Memo"), Johal addressed the *prima facie* case using the long established "legitimate expectations" test; however, she raised a broader issue of qualification when she stated on page 1 of the DC Memo, "LLF fired Johal, an Asian, on July 13, 2001. The replacement of a qualified Asian with a qualified Caucasian creates an inference of racial discrimination."

In the Circuit Court Johal responded again to the "legitimate expectations" test utilized in the Seventh Circuit, but then challenged the "legitimate expectations" paradigm. She advanced the second part of the "objective qualifications" test and argued that evidence of performance presented by LLF "should be addressed more appropriately to the articulation of a legitimate, non-discriminatory reason for firing Johal." (Appellant's Brief p. 26). She also quotes from *Gregory v. Daly*, 243 F. 3d 687 (2nd Cir. 2001) at 696-7, "But the crucial point remains the same: the qualification prong, as to which the initial burden lies on plaintiff, cannot be transformed into a requirement that the plaintiff anticipate and disprove an employer's explanation that inadequate ability or performance justified the job action at issue."

B. *Pretext.* LLF is wrong in its assertion that Johal failed to challenge the purported elimination of her position before the lower courts. She stated with respect to elimination of position as pretext on page 12 of the DC Memo:

> On January 1, 2001, the R&D department consisted of Johal as Manager and a technician. At the end of the year the department had become a part of technical services. The Director of Technical Services supervised the R&D, the product development chef prepared samples, and the lead technician continued unchanged. A two-person department had become a two and one half person department. Nothing was eliminated and the department was expanded. The purported elimination of position was not real.

C. *Motion to Strike.* LLF moved to strike portions of Johal's brief in the Seventh Circuit (i) relating to addressing LLF's evidence of performance at the pretext level rather than as part of a prima facie case and (ii) relating to comparisons of the Director of Technical Services position with the Manager of Research and Development position as evidence of pretext on the grounds that the issues had not been raised in the District Court. The Seventh Circuit denied the motion to strike and thus rejected LLF's assertion of waiver. App. p.43a. LLF did not renew those objections in its brief to the Seventh Circuit. The issue of waiver has been addressed, and LLF did not appeal the denial of its motion.

II. This Court should grant certiorari to define the scope of factual review necessary to rebut the existence of pretext and to define the circumstances under which the business judgment rule can be invoked properly to rebut pretext.

LLF is wrong when it asserts that the short and deceptively simple analysis of pretext by the Seventh Circuit raises no issue of importance beyond this case.

A. *Scope of Factual Review.* The Seventh Circuit sets forth the facts relied upon by it to decide pretext in a single

sentence, "It [the record] shows that the company's business demands were growing and changing and that Johal's former responsibilities were distributed among three other positions as part of an overall restructuring of job functions and reporting lines." (Petition pp. 4a-5a). Those were the facts presented by LLF to articulate its legitimate non-discriminatory explanation for firing Johal.

Johal presented two lines of analysis (comparison of the duties of Johal's position of Manager of Research and Development with the duties of the new Director of Technical Services and prior false use of a claimed elimination of position) to establish pretext. Facts in the record and case law cited by Johal supported each line of analysis. The pretext discussion of the Seventh Circuit sets forth neither the arguments of Johal nor the facts and cases which support her arguments.

LLF claims that the sentence in the Seventh Circuit's opinion, "But the record does not support an inference of pretext." (Petition p. 4a), shows by itself that "In so stating, the Seventh Circuit informed Plaintiff that her arguments and evidence had been considered and rejected." (Brief in Opposition p. 15). The sentence must be read along with the sentence following which Johal sets forth above. The meaning of the two sentences becomes clear if the word "because" is inserted between them to read, "But the record does not support an inference of pretext [because] It shows that the company's business demands ..." The two sentences do not address the specific arguments for pretext presented by Johal.

This Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d. 207 (1981) established that an employer needs only to articulate a legitimate non-discriminatory reason to rebut a *prima facie* case of unlawful discrimination. If a court properly can rely upon the facts which articulate a legitimate non-discriminatory explanation alone to rebut pretext, without discussion of the arguments, facts, and cases presented by an

employee to establish pretext, then the pretext stage has been effectively eliminated. The Seventh Circuit erred in its failure to address the arguments for pretext presented by Johal, but more importantly it erred in its exclusive reliance upon evidence submitted by LLF to rebut pretext. Implicit in the Seventh Circuit's reliance exclusively upon facts submitted by LLF to rebut pretext is the holding that a reason given as a legitimate non-discriminatory explanation can be sufficiently strong to negate the need to consider the evidence of pretext introduced by the employee. The analysis used by the Seventh Circuit made the arguments submitted by Johal superfluous and in effect is a silent nullification of *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d. 668 (1973). The sparse analysis of pretext does not immunize the case from review when the unstated underlying governing principle of law used is evident from the opinion.

LLF overstates Johal's position when it characterizes her argument to require the Seventh Circuit to "comment on every argument and piece of evidence offered by Plaintiff in support of her pretext argument." (Brief in Opposition p. 15). Johal contends that analysis of an argument for pretext must be based at least in part upon the facts submitted by her. *McDonnell Douglas v. Green* gives an employee at the pretext stage the right to demonstrate by competent evidence that the presumptively valid reason for an employment practice (discharge) was in fact a coverup for an unlawfully discriminatory decision. The facts identified by the employee are the facts relevant to the existence of pretext. Rule 56 of the Federal Rules of Civil Procedure authorizes the grant of summary judgment if the applicable facts ("pleadings, depositions, answers to interrogatories and admissions on file together with affidavits") show that there is no genuine issue as to any material fact. The interaction between *McDonnell Douglas v. Green* and Rule 56 mandates that the decision to grant summary judgment or affirm the grant of summary judgment on the issue of pretext must be

based at least in part upon the facts which the employee claims demonstrate pretext because the court must determine that those applicable facts do not raise a genuine issue in order to comply with Rule 56.

The Seventh Circuit acknowledged Johal's raising the argument that a genuine issue of material fact existed about whether LLF had eliminated her position as Manager of Research and Development. The Seventh Circuit purported to address the issue in full; however, in its response to the argument it looked only to LLF's growth and the dispersion of research and development responsibilities after Johal's discharge. It did not consider LLF's actions prior to Johal's discharge in creating the new position of Director of Technical Services which had overlapping R&D management responsibilities with Johal's position as Manager of Research and Development. (Petition pp.4a-5a).

It is insufficient for a court only (1) to identify the presumptively valid reason for the employment action, (2) to state generally that the employee disputes the accuracy of the presumptively valid reason, and (3) to conclude based either upon its general overview of the record or upon the facts submitted by the employer that the presumptively valid reason is not pretext. The evidence produced by the employer to show a legitimate non-discriminatory reason for its action cannot by itself rebut pretext when the employee has presented other competent evidence to demonstrate pretext. The analysis of pretext must include the evidence presented by the employee and not just the evidence introduced by the employer.

The arguments for pretext that Johal submitted were not frivolous. The District Court (App. pp. 15a-16a) and the parties acknowledge the similarities between the job descriptions for the Director of Technical Services and for the Manager of Research and Development. LLF explains the similarities by asserting that the Director of Technical Services supervises the Manager of Research and Development (Brief in Opposition p. 24). An alternate and

reasonable inference is that upon creation of the position of Director of Technical Services LLF intended for the new director to perform all the duties and responsibilities specified and to replace Johal.

This Court should grant certiorari to consider whether the interaction between *McDonnell Douglas v. Green* and Rule 56 of the Federal Rules of Civil Procedure requires analysis of the specific facts identified by the employee to demonstrate pretext before granting or affirming the grant of summary judgment with respect to pretext. Enunciation of such a requirement will provide assurance that evidence of pretext is fully and adequately reviewed at the summary judgment stage and increases the likelihood that the goals of Title VII will be achieved. The proper steps to address pretext are (1) to set out the appropriate standard for review, (2) to identify the pretext issues presented, and (3) to assess the validity of the issues presented. The Seventh Circuit did not do that.

B. *Business Judgment Rule.* The only standard for assessing pretext in the single paragraph, which addresses pretext in the opinion of the Seventh Circuit, is that the role of the court is not to "question the wisdom of a company's decision on how to run its business." (Petition p. 5a). The Seventh Circuit uses the business judgment rule in a situation where a business choice does not govern.

LLF's legitimate non-discriminatory explanation for the firing of Johal was that it had eliminated her position. A decision to eliminate Johal's position would be a business decision. The fact that a business decision preceded and lead to LLF's articulated legitimate non-discriminatory explanation for discharge would have no impact on the validity of any argument for pretext that Johal presented. The applicability of the business judgment rule arises after presentation of an argument for pretext and then would be based upon the nature of the argument presented.

Contrary to LLF's assertion (Brief in Opposition pp. 20-21) the Seventh Circuit did not properly use the business judgment rule. The essence of the business judgment rule is that facts presented to establish pretext do not warrant an inference of discriminatory intent when those facts can be explained as the exercise of honest business judgment. See *Paluck v. Gooding Rubber Company*, 221 F. 3d 1003 (7th Cir. 2000) at 1013 (Layoffs justified by a loss of business), *Lesch v. Crown Cork & Seal Co.*, 282 F. 3d. 467 (7th Cir. 2002) at 73-4 (Selection of one accountant over another for a new position after the phase out of a division), and *Kariotis v. Navistar Int'l Transp. Corp*, 131 F. 3d 672 (7th Cir. 1997) at 677-8 (Honest belief in inaccurate information which if true would have warranted action taken). These cases represent the broad categories where courts apply the business judgment rule: (1) reorganizations and reductions in force, (2) selection of particular individuals, and (3) reliance upon incorrect information. Each of the foregoing cases only turned to the business judgment doctrine after a thorough exposition of the facts on which the employee relied to assert pretext, and the business judgment rule was a response to the argument presented.

From May 15, 2001, through July 13, 2001, LLF had two positions with identically described responsibilities for management of the research and development function, the Director of Technical Services and the Manager of Research and Development. If the issue of pretext raised by Johal were whether an inference of pretext could be drawn from the elimination of one out of those two positions, invocation of the business judgment doctrine would have been appropriate because the decision to have one rather than two persons manage the research and development function is a business decision. See *Krchnavy v. Limagrain Genetics Corporation.* 294 F 3d 871 (7th Cir. 2002) at 878. The primary issue of pretext raised by Johal, however, was whether the creation of a new position with overlapping research and development functions with the position of Manager of Research and

Development, followed almost immediately by the elimination of the original position, could evidence discriminatory intent. The business judgment doctrine does not apply because according to Johal LLF did not change its operations and continued, except for the two-month overlap from May 15 to July 13, 2001, to have a single person being in charge of research and development. The issue was whether the positions of Manager of Research and Development and Director of Technical Services were sufficiently similar to raise a question about whether one was a continuation of the other. The issue is one of interpretation and inference and not one of business choice.

The business judgment rule has relevance only in response to the facts purportedly establishing pretext and should be invoked only after presentation of the argument for pretext. The business judgment rule is frequently incanted but not always properly applied. This Court should grant certiorari to define when the business judgment rule can be properly invoked.

III. This Court should grant certiorari to resolve the conflict between the Circuits about whether the qualification element of a *prima facie* case involving the discharge of an employee should be the "legitimate expectations" test used by the First, Fourth, Seventh, and Ninth Circuits or the "objective qualifications" test used by the Third, Fifth, Sixth, Tenth, Eleventh, and DC Circuits.

The conflict among the circuits concerning the qualification element of the *prima facie* case is well developed. Six Circuits favor objective qualifications, four Circuits favor legitimate expectations, and two Circuits vacillate between the two tests. The cases cited in the Petition define the issues. Added refinement of the issue is

not required. The conflict is long standing; waiting for the Circuits to act will not resolve the issue.

The issue is recurring. The definition of the qualification element of the prima facie case arises in every claim made by a discharged employee who seeks relief pursuant to Title VII in accordance with *McDonnell Douglas v. Green supra.*

The conflict has significant impact. LLF is not correct when it asserts, "It makes little to no difference what test a court follows because in the end the court invariably will engage in a pretext analysis, making the difference in the prima facie case analysis essentially meaningless." (Brief in Opposition p.18). Cases do address the qualification issue of the *prima facie* case and then stop without proceeding to pretext. See *Coco v. Elmwood Care Inc.* 128 F. 3d 1177 (7th Cir. 1997) at 1180, *Cengr v. Fusibond Piping Systems, Inc.*, 135 f 3d 445 (7th Cir. 1998) at 453, *Contreras v. Suncast Corporation*, 237 F. 3d 756 (7th Cir. 2001) at 761 FN 3, and Peele *v. Country Mutual Insurance Co.*288 F 3d. 319 (7th Cir. 2002) at 332. Discharged employees who did not meet the legitimate expectations test may have had valid bases to show pretext that were never considered.

Resolving the conflict between "legitimate expectations" and "objective qualifications" in favor of "objective qualifications" will eliminate the need for litigants and the courts in circuits, which now follow the "legitimate expectations" test, to struggle with and to address the overlap between performance at the *prima facie* stage and performance at the pretext stage. The review process would be streamlined, and the focus in discharge cases would be directed toward the ultimate issue of discrimination. Resolving the qualifications conflict would end the conflict on the issue within the Second and Eight Circuits.

Many states have adopted the rationale of *McDonnell Douglas v. Green* for the operation of their own employment discrimination statutes. The same conflict between "legitimate expectations" and "objective qualifications"

exists among the states. Resolution of the conflict by this Court would provide guidance for the state courts.

The flexibility envisioned by *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d. 957 (1978) relates to adaptation of the *McDonnell Douglas v. Green prima facie* case to differing fact patterns and not to authorizing the same fact pattern to be treated inconsistently in different circuits.

Gerth v. Sears Roebuck & Co., 94 F. 3d 644 (1996) was an action based upon the Kentucky discrimination statute with federal jurisdiction based upon diversity of citizenship. The issue of conflicts between circuits in the interpretation of the qualification requirement would not have arisen because a state statute was involved. The denial of certiorari in *Gerth*, 519 U.S. 1092 (1997) would have no bearing upon the cert worthiness of this case.

This Court can consider one of the arguments presented (pretext, qualifications, or statistics) without consideration of the others. *O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308, 116 S. Ct. 1307 (1996) shows that this Court will grant certiorari on one issue in an employment discrimination case while declining to review an alternate ground (prima facie case qualification).

CONCLUSION

For reasons stated in the Petition and herein, Petitioner respectfully requests that this Court grant a Writ of Certiorari to review the Judgment of the Seventh Circuit Court of Appeals.

Respectfully submitted
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